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In the
Supreme Court of the United States

BRADLEY EARL HACKER,

Petitioner,

v.

THOMAS MCBRIDE, WARDEN and
STATE OF WEST VIRGINIA,

Respondent.

On Writ of Certiorari to the
West Virginia Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May West Virginia, alone among the states, employ the same sentencing scheme that was rejected by the Court for the death penalty, in which the ultimate penalty, here life without mercy, is imposed by a jury with total discretion and no guidance, or does this process violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution?

2. Under the West Virginia first-degree murder statute, in the felony-murder trial of a defendant who was not the murderer is counsel's failure to move for discretionary bifurcation of guilt and penalty phases of trial *per se* ineffective assistance of counsel?

LIST OF PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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CITATIONS OF PRIOR OPINIONS

The Judgment Order of the Circuit Court of Kanawha County, West Virginia, rendered on January 8, 2003 is unpublished and attached at Appendix A-41.[1]

The Order of the Supreme Court of Appeals of West Virginia refusing to hear Petitioner's direct appeal from the Judgment of the Circuit Court of Kanawha County, entered November 19, 2003 is unpublished. A-32.

The Order of the Supreme Court of the United States refusing Petitioner's Petition for *certiorari* on direct appeal is published at *Hacker v. West Virginia*, 541 U.S. 1042 (May 17, 2004).

The Order of the Kanawha County Circuit Court, denying the Petition for *habeas corpus* relief in Civil Action No. 05-MISC-228, entered January 8, 2007, is unpublished. A-16.

The Order of the Supreme Court of Appeals of West Virginia refusing to hear Petitioner's appeal of the circuit court's denial of *habeas corpus* relief, dated November 7, 2007 is unpublished. A-1.

JURISDICTIONAL STATEMENT

This Petition requests a ruling on the constitutionality of *West Virginia Code* § 62-3-15, facially and as applied, under the due process and prohibition against self-incrimination clauses of the Fifth Amendment of the United States Constitution, the Sixth Amendment of the United States

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[1] References to the Appendix are hereafter indicated by "A-" and the appropriate page reference therein.

Constitution providing for a fair trial, the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishment, and the Fourteenth Amendment requiring due process, all applied to the States through the Fourteenth Amendment of the United States Constitution.

Discretionary review of Petitioner's Petition for state *habeas corpus* relief was denied by the Supreme Court of Appeals of West Virginia on November 7, 2007. Jurisdiction of this case on writ of *certiorari* is conferred by 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS

West Virginia Code Section 62-3-15 provides for a unitary trial in a first degree murder case (including felony-murder) with an automatic sentence of life without possibility of parole upon conviction unless the jury in its total discretion recommends mercy. The Code provides in pertinent part:

> If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree ... he or she shall be punished by imprisonment in the penitentiary for life, and he or she ... shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole ... except that, ... such person shall not be eligible for parole until he

> or she has served fifteen years: Provided however, That if the accused pleads guilty of murder of the first degree, the court may, in its discretion, provide that such person shall be eligible for parole [after] he or she has served fifteen years.

W. Va. Code § 62-3-15 (1994).

Amendment V provides in pertinent part: "No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. Amend. V.

Amendment VI provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment VIII prohibits the infliction of "cruel and unusual punishments."

Amendment XIV provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

Petitioner was convicted of felony-murder under *West Virginia Code* § 62-3-15 and automatically sentenced to life without mercy with no opportunity to present mitigating evidence or

argument, to speak on his own behalf, or to have the jury instructed on mercy or mitigation. Petitioner asks whether this statutory scheme, which is a relic of death penalty sentencing and remains law only in West Virginia, is constitutional.

Under West Virginia law, a defendant who is charged with felony murder faces an automatic sentence of life without mercy (life without the possibility of parole). The jury may, however, in its total discretion, recommend mercy. No jury instruction on mercy or mitigation can be given. If the jury recommends mercy, the defendant is eligible for parole after 15 years. The jury's total discretion to give or withhold mercy must be uninformed and unrestrained; such broad discretion essentially is lawless.

Under this statute, if a defendant, like Petitioner, goes to trial for first-degree (felony) murder, he has only one chance to argue for mercy: during the guilt phase of the trial. His counsel can request bifurcation of the trial, which is discretionary with the trial court. If counsel does not request bifurcation, the defendant must choose between asserting his right to remain silent and confessing guilt to felony murder. As the only witness to the murder, Petitioner would have been required to take the stand at his own trial and acknowledge his guilt before he could testify to his minor role (in support of mercy). Obviously, confessing guilt undermines the right to present a full defense.

Petitioner was convicted of first-degree murder (felony murder) as a result of his presence at the murder of Jason Gill, who was killed by John

Frye during an alleged robbery. Petitioner did not kill the victim, did not intend to kill the victim and did not participate in any significant way in the homicide. He has always acknowledged he was present when co-defendant John Frye totally unexpectedly murdered their mutual friend and drug supplier Jason Gill. (Frye later explained he was using mind-altering drugs and insanely jealous because people were saying Gill was sleeping with his girlfriend. A-80, Aff. ¶¶ 7-8.) Fearing Frye, Petitioner helped load Gill's body in the car and was present while Frye burned the body and buried it in a shallow grave, but Petitioner did not participate. *Id.* A-82 ¶ 18. Although Petitioner did not take any part in disposing of the body, he also did not turn Frye in to the authorities and gave no statement until he, Petitioner, was arrested for the murder.

The only evidence linking Petitioner to robbery or murder was given by a fellow inmate, who has since recanted all material portions of this testimony. Aff., A-84. Co-defendant Frye did not testify because he was awaiting trial on the same charges.[2] Petitioner was the only eyewitness to the crime and so the only witness to his minor role in the homicide. To testify to his participation, however, Petitioner would have to waive his constitutional right to remain silent at trial. Discretionary bifurcation of the guilt and penalty phases of the trial is available, but defense counsel made no motion. In its absolute discretion, the jury found

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[2] Frye has since averred by affidavit and testified that no robbery was planned and that he alone planned to and murdered Jason Gill. After Petitioner's trial, Frye pled guilty to first-degree murder and was sentenced to serve life without mercy.

Petitioner guilty of felony-murder with no recommendation of mercy. In deciding to refuse mercy, the jury probably considered Petitioner's decision not to testify and the horrible crime that Frye committed; it was not instructed otherwise. As required by the jury verdict of guilt and *West Virginia Code* § 62-3-15, Petitioner was sentenced to and is now serving life imprisonment without chance for parole for the felony-murder conviction

Petitioner timely petitioned the Supreme Court of Appeals of West Virginia, which refused the appeal. One ground for direct appeal was the prosecution's unconstitutional comments on Petitioner's decision not to testify. In refusing to accept the petition and review the case, the state Supreme Court did not reach the merits, but instead differed 3-2 on the issue whether life-without-mercy cases should receive full appellate review. A-32. A petition to the Court for a writ of *certiorari* on the same grounds was denied. *Hacker v. West Virginia*, 541 U.S. 1042 (May 17, 2004).

The constitutional issues in this Petition, created by West Virginia statute § 62-3-15, were first raised in the *habeas corpus* petition filed in Kanawha County, West Virginia on May 16, 2005, based on a claim of ineffective assistance of counsel for failure to move to bifurcate.[3] *See* A-70. Petitioner

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[3] Petitioner also contended (1) that the conviction was obtained by perjured testimony and (2) actual innocence. Both claims are both based on newly discovered evidence presented in affidavits by trial witness and jailhouse informant Nickey Don Smith, who now swears that all his material testimony at trial was false, as well as an affidavit by co-defendant John Frye that no robbery was planned, but Frye alone intended to and did shoot and kill Jason Gill. *See* A-79, A-87. Both

argued that the structural problems of a unitary trial prevented him from presenting mitigating evidence on mercy, A-72, creating compelling prejudice under *West Virginia Code* § 62-3-15, which requires an automatic verdict of life without mercy for conviction. *See* A-73. Petitioner set out the due process and fair trial violations and questioned the constitutionality of § 62-3-15. *See* A-75-77.

An evidentiary hearing on the *habeas* petition was held before the original trial judge, on March 31, 2006. Both Nickey Don Smith, the jailhouse informant, and co-defendant John Frye testified in support of their affidavits. On January 5, 2007, the petition was denied. A-16. In denying the writ, the court repeatedly commented on Petitioner's failure to testify at trial or the evidentiary hearing. A-18 ¶ 11; A-22 ¶ 27; A-31 ¶ 33. The court further held that the failure to seek a bifurcated trial, "although apparently ill advised, nevertheless was the strategic decision of trial counsel and the Petitioner[.]" A-30 ¶ 25. This holding was directly contradicted by counsel's testimony that there was no strategic or legal reason not to bifurcate and there was a reasonable probability that the outcome would have been different if he had moved to bifurcate: "I think it could have made a difference between with and without mercy ... . I think that it very well could have made a difference between with and without." A-69.

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affidavits were supported by the affiants' testimony at the evidentiary hearing. Petitioner further claimed (3) that the prosecutors' improper closing arguments were unconstitutional; and (4) that counsel was further ineffective for failure to object to the improper prosecution arguments or to put forward any defense.

Petitioner timely appealed denial of the *habeas* petition to the Supreme Court of Appeals of West Virginia. The appeal petition reiterated the issues of failure to bifurcate, the structural problems created by § 62-3-15, compelling prejudice, fair trial issues and the constitutionality of this process. *See* A-46-53. The state Supreme Court refused the petition 3-2, again not reaching the merits, but instead airing internecine differences on whether the State's sole appellate court should provide mandatory appellate rights in life-without-mercy cases. A-1.

This Petition followed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Petition asks whether a sentence of life without mercy (with no possibility of parole) imposed by a jury with total discretion and no guidance violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. This is the same sentencing scheme for death penalty cases that was rejected in *Furman v. Georgia,* 408 U.S. 238 (1972). Central to *Furman* was the conviction that "the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth amendments." *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976). West Virginia's sentencing mechanism for first degree murder is identical to the sentencing processes in Georgia, North Carolina and other death penalty states that *Furman* rejected as arbitrary and discriminatory in violation of the Eighth Amendment. The Court has never addressed the question whether the ultimate penalty in non-capital states may be imposed by the same arbitrary scheme.

I. THE SUPREME COURT SHOULD GRANT CERTIORARI AND EXERCISE JUDICIAL OVERSIGHT OVER WEST VIRGINIA'S UNIQUE, ARBITRARY AND UNCONSTITUTIONAL SENTENCING LAW FOR FIRST-DEGREE MURDER.

West Virginia is the only state in the nation that retains this relic of pre-*Furman* sentencing law:[4] a defendant convicted of first-degree murder automatically receives a sentence of life without mercy (no possibility of parole) unless the jury recommends mercy.

> [I]f the jury finds in their verdict that [the defendant] is guilty of murder of the first degree ... he or she shall be punished by imprisonment in the penitentiary for life [and] shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy[.]

W. Va. Code § 62-3-15.

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[4] Of the states without capital punishment, none except West Virginia retains this arbitrary sentencing procedure for first-degree murder: Alaska, Alaska Stat. § 12.55.125; Hawaii, Haw. Rev. Stat. § 706-656; Iowa, Iowa Code Ann. § 902.1; Maine, ME Rev. St. Ann. Tit. 17-A § 1251; Massachusetts, Mass. Gen. Laws ch. 265 § 2; Michigan, Mich. Comp. Laws. § 750.316; Minnesota, Minn. Stat. § 609.185; North Dakota, N.D. Cent. Code § 12.1-32-01; New Jersey, N.J. Stat. Ann. 2C:11-3; New York, N.Y. Law § 125.00; Rhode Island, R.I. Code §§ 11-23-2, 12-19.2-4; Vermont, Vt. Stat. Ann. § 940.03; Wisconsin, Wis. Stat. §§ 940.01, 940.03; District of Columbia, SC ST § 22-2104. It is unconstitutional to impose the death penalty based on unlimited and uninformed jury discretion. *Woodson*, 428 U.S. at 302.

West Virginia trial judges are required to instruct the jury that mercy is an option, *State v. Kopa*, 311 S.E.2d 412, 422 (W. Va. 1983), but just as in pre-*Furman* death penalty states, the jury's decision whether to ignore the ultimate punishment and dispense mercy must be wholly unlimited, free, and unconstrained by reason or by facts. In West Virginia, no jury instruction can be given on mercy – or on mitigation. *State v. Miller*, 363 S.E.2d 504, 509 (W. Va. 1987) ("[W]e hold that an instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given."). *Miller* relies entirely on old Georgia law from the pre-*Furman*, pre-*Woodson* death penalty days – Georgia cases that upheld total jury discretion in the years before the Court eliminated this unconstitutional process for imposing the death penalty. *See infra* at II.A. Although the Court long ago rejected this procedure for death penalty cases, the Court has never reviewed a case where the same arbitrary, lawless and discriminatory system is employed for the ultimate punishment in non-capital states.

Indeed, West Virginia is uniquely positioned to evade review on this critical constitutional question. Because West Virginia is the only state to retain limitless jury discretion in imposing the ultimate state punishment, there are not and never will be conflicts between the decisions of the Supreme Court of Appeals of West Virginia and other state courts of last resort. Sup. Ct. R. 10(b). No other state court of last resort will ever be asked to consider the issue. For the same reason, there will be no conflict among the federal courts of appeals. Sup. Ct. R. 10(a). The Fourth Circuit last reviewed this

question in 1992. *See infra* n.9. No other federal appeals court will ever be asked to review the question.

In West Virginia, 251 persons are currently serving sentences of life without mercy.[5] The great majority of these individuals, approximately 96%, were convicted of first degree murder.[6] All of the sentences of life without mercy – both the 96% for murder and the 4% for kidnapping -- were imposed under the unconstitutional system that includes an uninstructed, uninformed jury dispensing or withholding mercy. The Supreme Court of Appeals of West Virginia, the sole state appellate court, has not revisited this issue since 1990. *See Billotti v. Dodrill,* 94 S.E.2d 32, 41-43 (W. Va. 1990) (relying on *Miller, supra*). Because there is no mandatory appellate review in West Virginia criminal cases, if unsupervised, the state Supreme Court may never choose to reconsider the issue.[7] In Petitioner's case, for example, the Supreme Court of Appeals of West Virginia refused both of Petitioner's requests for

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[5] *See* West Virginia Division of Corrections Annual Report, FY 2006-2007 at 56, *available at* http://www.wvdoc.com/wvdoc/OfficeofResearchPlanning/tabid/70/Default.aspx.

[6] *See* Disposition of Life Sentences Appealed to W. Va. Sup. Ct. of App., Jan. 1998-Dec. 2007, *compiled* by W. Va. Public Defender Svcs. Under West Virginia law, kidnapping is punished by the same method as first degree murder, that is, a determinate life sentence with unlimited, uninstructed jury discretion to provide mercy. *See* W. Va. Code § 61-2-14a(a).

[7] Other than West Virginia, only Virginia still provides no mandatory appellate review for criminal defendants. *See Bundy v. Wilson,* 815 F.2d 125, 128 (1st Cir. 1987); *see also* Va. Code Ann. §§ 17.1-406, 17.1-407 (1988).

review, first on direct appeal and then on appeal from denial of the state *habeas* petition. *See supra* at Cit. of Prior Op. Of the 125 individuals sentenced to life without mercy in West Virginia since 1998, 75% received no appellate review.[8]

This is the rare case where a single state is operating a plainly unconstitutional sentencing system that deprives persons of liberty arbitrarily, without due process, and in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. Judicial review by the Court is the only remedy that will force the Supreme Court of Appeals of West Virginia to obey the dictates of the federal Constitution. Petitioner asks the Court to strike down the statute as unconstitutional to protect state citizens from the arbitrary justice and random injustice perpetuated by West Virginia's first-degree murder statute.

II. THE SUPREME COURT SHOULD GRANT *CERTIORARI* BECAUSE *WEST VIRGINIA CODE* § 62-3-15 IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED, AND DEPRIVES .DEFENDANTS OF LIBERTY FOR LIFE ARBITRARILY AND WITHOUT DUE PROCESS.

A. The Eighth Amendment Requires that a Life Sentence without Mercy not be Imposed Arbitrarily and Capriciously.

Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), all states that authorized capital punishment had abandoned mandatory death

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8 Disposition of Life Sentences, *supra* n.6.

penalties, but instead permitted the jury unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case. *See Lockett v. Ohio*, 438 U.S. 586, 597-98 (1978). Upon conviction, a jury was required to impose death unless it gave mercy, but the recommendation of mercy was totally discretionary. For example, in Georgia pre-*Furman* death penalty cases held: "The jury, presumably being men of intelligence, . . . of necessity must have known that the and a recommendation or refusal could be made with or without reason." *McLendon v. State,* 52 S.E.2d 294 (Ga. 1949) (emphasis added). In a similar vein a 1943 Georgia death penalty case held that the jury's dispensation of mercy must be totally free and without any oversight of law or instruction:

> The jury in determining whether or not to recommend mercy is not controlled by any rule of law, nor could the court under any circumstances instruct them as to when they should, or should not, make such a recommendation. They may do so with or without reason, and they may decline to do so with or without a reason. It is a matter wholly within their discretion.... For ourselves we think little, if anything, can be added to the words of the statute without qualifying it.

Hicks v. State, 27 S.E.2d 307, 309 (Ga. 1943) (emphasis added).

In *Furman*, however, this Court rejected such untrammeled jury freedom, holding that in capital

cases discretionary sentencing unguided by legislatively defined standards violated the Eighth Amendment because it was "pregnant with discrimination," 408 U.S. at 257 (Douglas, J. concurring), and permitted the death penalty to be "wantonly" and "freakishly" imposed, *id.* at 310 (Stewart, J., concurring) and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it was not." *Id.* at 312 (White, J. concurring). Whether the unreasoned jury decisions found in *Furman* should be solved by mandatory sentencing with no discretion or by channeled discretion, that is, discretion with instruction, was settled in a series of cases holding that the jury's sentencing discretion should not be eliminated, but should be "directed and limited," to avoid "a substantial risk that the [death penalty] will be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia,* 428 U.S. 153, 188 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas,* 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325 (1976).

In West Virginia the death penalty was abolished in 1965. 1965 W. Va. Acts, ch. 40. The ultimate penalty is now life imprisonment without mercy – without chance of parole – and it is imposed exactly like the death penalty was imposed pre-*Furman*. Upon conviction, a jury is required to impose the ultimate penalty unless it gives mercy, but the recommendation of mercy is totally discretionary. *Miller, supra,* 363 S.E.2d at 509 ("[A]n instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given.")

Ironically, *Miller* relies on and cites with approval 1943 and 1949 pre-Furman death penalty cases from Georgia where the jury request for guidance on mercy was turned down. "The jury ... must have known that the matter of recommending mercy was within their discretion and a recommendation or refusal could be made with or without reason." *Miller,* 363 S.E.2d at 507 (quoting *McLendon v. State*, 52 S.E.2d 294 (Ga. 1949)). The jury may recommend mercy "with or without reason, and they may decline to do so with or without reason." *Id.* (quoting *Hicks v. State*, 27 S.E.2d 307, 309 (Ga. 1943)). *Miller* also relies on a 1967 (pre-*Furman*) Georgia case that holds that to give any instruction on mercy "would interfere with the jury's unlimited discretion to decide whether to recommend mercy." *Id.* at 508 (citing *Manor v. State*, 229 S.E.2d 85 (Ga. 1967)). Further citations to death penalty cases from 1902, *Cohen v. State,* 42 S.E. 781 (Ga. 1902); from 1919, *State v. Martin,* 106 A. 385 (N.J. 1919); from 1942, *State v. Jones*, 23 S.E.2d 387 (S.C. 1942); and A.L.R. annotations from 1922 and 1942 are all wholly outdated. *Miller*, 363 S.E.2d at 508.

The entire rationale for the West Virginia ruling in *Miller* looks to death penalty rulings that were no longer good law when *Miller* was decided – at least regarding the death penalty. *Miller* fails to mention the crucial majority holding decided seven years earlier in *Furman* that to allow a jury such unlimited discretion to impose a determinate penalty or to dispense mercy necessarily leads to unreasoned, arbitrary, and thus discriminatory assignment of the penalty. Per *Furman* and its progeny, this randomness and discrimination in imposing the death penalty violate the Eighth

Amendment. *Miller* does not mention the death penalty cases that overturned those Georgia precedents and *Miller* attempts no distinction – if one can be made – between imposing the death penalty and imposing a sentence of life without mercy Where the jury's decision must made without instruction and with or without any reason, this process is the hallmark of arbitrariness, whatever the penalty.

The issue is not that the jury is involved in the sentencing.[9] In capital cases, it has been explained that participation of the jury brings public input and contemporary public morality to bear on issues of life and death, *Gregg,* 428 U.S. at 188, and a similar argument can be made for jury decision on the ultimate sentence in non-capital states. Nor is the question whether the legislature can dictate determinate sentencing; it can. *See Lockett, supra,* 438 U.S. at 603 ("[L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in non-capital cases[.]") The crux of the issue is that mercy withheld "with or without reason" and "for any reason or for no reason" leads to arbitrary punishment, and violates the Eighth

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[9] In *Billotti v. Legursky*, 975 F2d. 113, 117-18 (1992), the Fourth Circuit examined whether West Virginia § 62-3-15 and the failure to provide guidelines for juries in making recommendations of mercy allowed arbitrary and irrational decisions violating due process. *Billotti* held that juries may constitutionally participate in sentencing, *Id.* at 117, that the Constitution requires limits on jury discretion only in capital cases, *id.*, and that West Virginia's discretionary mercy allows a jury to consider any, all, or none of the evidence offered at trial, which, according to the Fourth Circuit, is an improvement on a legislatively-imposed mandatory sentence. *Id.* at 118. None of these points addresses the issue of the jury's arbitrary and irrational imposition of the ultimate penalty.

Amendment prohibition against cruel and unusual punishment. Neither the West Virginia court nor the Fourth Circuit have identified this problem.

Today, in West Virginia, the same uninformed, unconstitutional pre-*Furman* sentencing scheme is used for those found guilty of first-degree murder. Surely, our nation's fundamental respect for humanity requires that defendants not be sentenced to life without mercy based on the caprice or whim or mere sympathy of the jury, yet that is the process. Petitioner is serving life without mercy for felony murder, but there is no reasoned basis to say why mercy was withheld, and for that reason alone his sentence violates the Eighth Amendment and Fourteenth Amendments.

B. The Fifth and Fourteenth Amendments Require that the Jury be Instructed and Given Information Necessary for a Reasoned Decision, Otherwise Defendants are Deprived of Liberty Arbitrarily.

Fundamental due process assures that no person will be deprived of life, liberty, or property without due process of law. U.S. Const., Amend V. Due process of law is not arbitrary or capricious, but is based on relevant information and informed by reason. In even the most mundane situations, due process requires fair procedures and prohibits arbitrary denials of persons' interests. *See Bell v. Burson*, 402 U.S. 535 (1971) (fair procedures required before a driver's license may be revoked); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (due process prohibits the arbitrary denial of a person's interest in adjudicating a claim before a

state commission). "The touchstone of due process is protection of the individual against arbitrary action of government." *Dent v. West Virginia,* 129 U.S. 114, 123 (1889).

Interest in personal liberty is the most elemental of liberty interests, that is, to be free from physical detention by one's own government. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 529 (2004). "As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution." *Foucha v. Louisiana,* 504 U.S. 71, 90 (1992) (Kennedy, J., dissenting).

Yet, under *West Virginia Code* § 62-3-15, Petitioner and many other West Virginia defendants have been sentenced to lifelong loss of liberty based solely on a jury's arbitrary decision to withhold mercy. There is no hearing on mercy or mitigation before a jury that cannot, in any case, be instructed on mercy or mitigation. The jury may see mitigating evidence, but it cannot be identified as relevant to mercy. For example, a defendant's minor role and lack of criminal intent are valid mitigating considerations. It is elementary that Petitioner, for example, must be sentenced for his crime and not that of John Frye. No instruction on these points, however, can be given. The arbitrary nature of this judgment on mercy offends our fundamental notions of due process.

Instead, uninstructed juries may well be considering unconstitutional reasons such as the

defendant's failure to testify or irrelevant reasons like the heinous nature, as here, of another's crime. None of the procedural protections that the Court has provided for death penalty defendants to protect against such arbitrary decisionmaking by juries are available.[10] It is blackletter constitutional law that no person can be deprived of liberty without due process. Under § 62-3-15, a West Virginia defendant gets no process with regard to mercy. No matter what modicum of process is due, due process is a reasoned process, based in law and evidence, not a random or irrational process, and not a decision made simply on sympathy, or lack of sympathy. Yet the process approved for first degree murder trials in West Virginia provides the jury no other basis.

McGautha v. California, 402 U.S. 183 (1971), remains the law on defendants' Fifth Amendment right to a separate sentencing hearing in death penalty cases. *McGautha* declared there is no such right, although as Justice Douglas soon lamented,

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[10] *See Gardner v. Florida*, 430 U.S. 349, 356 (1977) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."); *Gregg*, 428 U.S. at 193 ("It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Eighth and Fourteenth Amendments require that the sentencer, "in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (original emphasis).

"We are now imprisoned in the *McGautha* holding. Indeed the seeds of [*Furman*] are in *McGautha*." *Furman,* 408 U.S. at 248 (Douglas, J. concurring). To reach its due process holding, *McGautha* first turned aside any challenge to unguided jury discretion:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.

McGautha, 402 U.S. at 207. That rejection, of course, lasted less than a year, but because *Furman* relied on the Eighth Amendment rather than the Fifth and Fourteenth Amendment due process rights, *McGautha* was not strictly overruled. *Furman,* however, effectively limited *McGautha,* and that limitation was recognized in *Gregg*:

> While *Furman* did not overrule *McGautha*, it is clearly in substantial tension with a broad reading of *McGautha's* holding. In view of *Furman*, *McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause.

Gregg, 428 U.S. at 195, n.46. The question Petitioner raises today is whether the standardless jury

procedures West Virginia employs do violate the Fifth and Fourteenth Amendments.

Since *Furman,* this Court has held that "fundamental respect for humanity" underlying the Eighth Amendment requires that juries have a great deal of information before the death penalty is imposed or mercy is granted. *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976)(Consideration of the character and record of the individual offender and the circumstances of the particular offense are a constitutionally indispensable part of the process of inflicting the death penalty); *Lockett, supra,* 438 U.S. at 604 (sentencer should consider "as a mitigating factor ... any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Eddings v. Oklahoma,* 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law,* any relevant mitigating evidence.") (original emphasis). All this information about the defendant and the offense is necessary for the sentencing jury so that the death penalty may be inflicted based on a reasoned decision, informed by law and after consideration of every type of mitigating evidence the defendant can offer. In the absence of these procedural and substantive protections, jury decisions on mercy were irrational, "freakishly imposed," with no basis to distinguish those receiving mercy from those who did not.

West Virginia juries still employ the freakish mercy procedure. Unquestionably, death is a unique

penalty, a penalty that once imposed can never be undone. But that characteristic creates no meaningful difference between an ultimate punishment that may constitutionally be imposed only through a rational process with guided instruction, and an ultimate punishment that may be imposed for any reason – or for no reason. So long as a man's life is not taken, may his liberty be taken for his lifetime on a jury's unfounded fancy or caprice? Surely, the Fifth and Fourteenth Amendment commands that no one may be deprived of liberty without due process of law forbids this result.

The due process rights of most defendants in non-capital cases are protected by "the established practice of individualized sentences [that] rests not on constitutional commands but public policy enacted into statutes." *Lockett, supra,* 438 U.S. at 604-605. The implicit assumption is that there are capital cases, generally controlled by *Furman* and its progeny, and non-capital cases, generally controlled by public policy and statute. [11] That

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[11] By statute, the great majority of federal and state criminal defendants are provided with sentencing procedures that include presentence reports where defendants can provide input, and sentencing hearings where defendants may contest presentence findings, put on evidence, and argue for a sentence within the statutory range. *See* 18 U.S.C. § 3553(a) ("court shall impose a sentence sufficient, but not greater than necessary," to comply with statutory purposes); 18 U.S.C. § 3553(a)(1) (court "shall consider ... the nature and circumstances of the offense and the history and characteristics of the defendant"); Fed. R. Crim. P. 32; W. Va. R. Crim P. 32. Under the sentencing rules, courts are required to provide defendants and their counsel an opportunity to speak on behalf of the defendant. Fed. R. Crim. P. 32(i)(4)(A)(i) & (ii); W. Va. R. Crim. P. 32(c)(3)(B) & (C).

protection breaks down for this small group of non-capital cases – like Petitioner's case -- punishable by a legislatively-imposed determinate sentence of life without mercy unless the jury applies its unlimited and untrammeled discretion to recommend mercy. Defendants in such cases do not lose their lives, but all individual liberty is taken by the State, and defendants must live their entire incarcerated life without possibility of relief or sentence reduction. This limited category of non-capital cases is unique to West Virginia, where defendants suffer the ultimate non-capital punishment, but are subject to wholly discriminatory sentencing because they lack both the statutory protection of individualized sentencing and the constitutional protections afforded capital cases.

> It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "[f]or the determination of sentences, justice generally requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Otherwise the system cannot function in a consistent and rational manner.

Gregg, supra, 428 U.S. at 189 (citations omitted).

In the now-exceptional case where West Virginia requires a sentence of life unless the jury in its unbounded discretion bestows mercy, both consistency and rationality are sacrificed. In this way, the West Virginia first degree murder statute, § 62-3-15, withholds justice and fairness, while

providing mercy randomly to the lucky few. Deprived of any due process, Petitioner also was not one of the lucky few.

C. Where the Jury is not Instructed on the Law of Mercy and Mitigation, the Trial Itself is Rendered Unfair in Violation of the Sixth Amendment.

The Constitution through the Sixth Amendment guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). A defendant tried before a jury that cannot be instructed on mercy and mitigation is deprived necessarily of this fundamental fair trial right. This is true whether the trial is unitary or bifurcated – in either case a defendant must put on mitigation evidence with no opportunity to put that evidence in a legal framework. No matter how much mitigation evidence is before it, the uninstructed jury is an irrational jury.

Under the unitary trial and determinate sentencing regime, if a defendant has mitigating evidence and argument to present, it must be put before the jury during the guilt phase – the only phase – of such a trial. By common sense and simple logic, however, mitigating evidence is evidence that goes to mitigating or easing the penalty to be imposed on a guilty person. Mercy is only available for a guilty defendant. An acquitted defendant has no need for mercy. To put on mitigation evidence therefore is to acknowledge guilt and essentially argue to the jury, "I am not guilty, but if I am guilty, please consider this testimony and these facts in support of mercy." A defendant also has the

constitutional right to the presumption of innocence that stays with him throughout a criminal trial. The right to remain silent is founded on that presumption and every jury must be instructed that even if the defendant does not take the stand, he does not lose the presumption of innocence until and unless the jury finds him guilty. Yet presentation of mitigation evidence forces the defendant to rebut that presumption – only the guilty need mitigation – and create doubt about his own defense.

While the defendant must put on his mitigation evidence in the guilt phase and argue for mercy, the jury cannot be instructed on mercy and cannot be told what factors should be considered in mitigation. All mitigation evidence of whatever form thus goes to the jury as relevant to guilt, on which the jury is fully instructed, but with no legal explanation as to how it might serve in mitigation. A trial process is not fair if it requires a defendant to put on evidence to rebut the presumption of innocence and undermine his own defense, but prevents a defendant from putting that evidence in any legal framework where the jury might consider it for its proper purpose of supporting mercy. This fundamental unfairness violates the Sixth Amendment.

This remains substantially true even if a trial is bifurcated and defendant receives a separate sentencing hearing. Evidence in mitigation is now presented separately, but because the jury remains uninstructed on the law of mercy and what factors it may consider and apply, the jury's discretion may be based on facts, but facts outside of the crucial legal context.

The West Virginia first-degree murder statute imposes random mercy or refusal of mercy, creates constitutional dilemmas and impasses at trial, and denies due process at sentencing, all in violation of the Constitution, for which it should be struck down.

III. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DECLARE THAT FAILURE TO MOVE FOR DISCRETIONARY BIFURCATION IN A FELONY MURDER TRIAL UNDER § 62-3-15 OF A DEFENDANT WHO IS NOT THE MURDERER IS *PER SE* INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner was tried for first degree murder (felony murder) in a unitary proceeding where there was no witness who could tell the story of his minor role in the homicide. Gill was dead. Frye was awaiting trial. Petitioner exercised his constitutional right to remain silent. The crucial information that only Petitioner had about his minor role in this offense was not presented to the jury. Defense counsel could have moved for a bifurcated proceeding. A West Virginia trial court has discretionary authority to bifurcate the guilt and penalty phases of a criminal trial in any case where the jury is required to make a finding as to mercy. *State v. LaRock*, 470 S.E.2d 613, 633 (W. Va. 1996). A trial court abuses its discretion if it refuses the request where "compelling prejudice" exists, that is, "where a defendant can demonstrate that without bifurcation he or she was unable to receive a fair trial regarding the finding of mercy and that the trial court could afford no protection from the prejudice suffered." *Id.* A felony-murder defendant

who was simply an accomplice or an accessory to a homicide necessarily suffers compelling prejudice. The minor role such a defendant, like Petitioner, had in the underlying murder is a mitigating factor that strongly warrants mercy.

The Court has held that death is not a valid penalty for one who never took life, attempted to take life, nor intended to take life. *Enmund v. Florida*, 458 U.S. 782, 787 (1982). In such case, death is an appropriate penalty and not disproportionate only if a defendant's participation in a felony that took life was major and his mental state was reckless indifference. *Tison v. Arizona,* 481 U.S. 137, 158 (1987). Importantly, the focus must be on the defendant's "culpability, not on that of those who committed the robbery and shot the victims[.]" *Enmund,* 458 U.S. at 798. In West Virginia the ultimate penalty of life without possibility of parole is being imposed on those who, like Petitioner, never intended or attempted to take a life, nor participated in a major way in a felony and were never recklessly indifferent to human life. Under the current sentencing scheme, however, these mitigating factors are never presented to the jury as relevant to mercy under the law.

Defense counsel's failure to bifurcate is also the failure to preserve Petitioner's right to present and argue these distinctions between guilt of felony murder and mitigation for one's mental state and minor role. If Petitioner had been able to present the evidence of his limited role without first waiving his right to remain silent, there is a reasonable probability the jury would have recommended mercy. Instead, it is likely that the jury considered

the heinous and senseless nature of the crime John Frye committed, the gruesome aftermath to which Petitioner was a mere witness, and Petitioner's failure to take the witness stand in his own behalf and present this evidence. Each factor violates Petitioner's right to be sentenced for the crime he committed, not another's crime, and not to be punished for exercising his constitutional right to remain silent.

Bifurcation does not and cannot solve all the constitutional problems created by the West Virginia death penalty statute. Even in a bifurcated sentencing hearing, the jury would still be legally uninstructed, but the result would be less random and more informed. No rational trial strategy allows an accomplice to felony murder to be tried as a murderer, and not take his only chance to explain to the jury his minor role and seek the lesser punishment. Defense counsel who deprives such a defendant of this crucial defense is *per se* ineffective.

CONCLUSION

West Virginia's first-degree murder statute tracks language and a process employed by death penalty states until it was rejected thirty-five years ago by this Court in death penalty cases. The Court's rulings in *Furman* and the cases that followed noted the unique nature of the death penalty and the Court's concern for humanity facing the death penalty, but the problems created by untrammeled jury discretion in awarding mercy arise whether death is the penalty or not. Determinate sentencing with a jury empowered to award mercy based on untrammeled discretion is inherently arbitrary

because it is legally unbounded, and inherently discriminatory because it is arbitrary. *Furman* found the Eighth Amendment violated by punishment so inflicted, but arbitrary punishments also violate the Fifth and Fourteenth Amendments because liberty may not be curtailed except after a reasoned process based on the law. A trial in which a defendant must put on any evidence that he has in support of mitigation, although the jury cannot be instructed as to how that evidence may be applied is not a fair trial under the Sixth Amendment. Under the West Virginia statute, a defendant is forced to choose between his constitutional right to trial and his right to be sentenced under a fair and just system, rather than by jury caprice.

Petitioner is serving life without mercy, his sentence pronounced under the unconstitutional system outlined above. Petitioner moves the Court to accept his Petition for writ of *certiorari* and, once his case is heard, to declare that *West Virginia Code § 62-3-15* is unconstitutional and that Petitioner is entitled to a fair trial and a full and reasoned sentencing process.

BRADLEY EARL HACKER

By counsel

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STATE OF WEST VIRGINIA

[Entered November 7, 2007]

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 7th of November, 2007, the following order was entered:

Bradley Earl Hacker, Petitioner Below,
Petitioner,

vs.) No. 071931

Thomas McBride, Warden, Respondent Below,
Respondent

On a former day, to-wit, June 7, 2007, came the petitioner, Bradley earl Hacker, by Benjamin L. Bailey and Deidre H. Purdy, Bailey & Glasser, LLP, his attorneys, and presented to the Court his Petition for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 8th day of January, 2007, with the record accompanying the petition.

Upon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition for appeal. Justices Starcher and Albright would grant.

Justices Starcher and Albright believe the petition for appeal should be granted, because the defendant was sentenced to life imprisonment without the possibility of parole – and this Court should hear the appeal of all such sentences, including habeas corpus appeals where the direct

appeal was refused, to assure the defendant received a fair trial.

The majority, in refusing to guarantee full appellate review to all life without parole sentences, ahs argued that it would be unfair to carve out a special review policy for defendants sentenced to life imprisonment. However, the Court has carved out just such a policy in civil appeals where punitive damages are awarded.

> 2. Under our system for an award and review of punitive damages awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal"
>
> 5. Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically

> addressed in the petition will be deemed waived as a matter of state law.

Syllabus Points 2 and 5, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Civil cases involving only money should certainly not receive more appellate review and due process than defendants sentenced to prison for the rest of their lives. In essence, the majority is giving "big business" defendants more rights than criminal defendants. This is wrong.

It is true that this Court and the Fourth Circuit have upheld the present system. *Id.* (citing *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2df 32 (1990), and *Billiotti v. Legursky*, 925 F.2d 113 (4th Cir. 1992)). But judicial notions of due process are not frozen in time. As noted by the United States Supreme Court in *Wolf v. Colorado*, 388 U.S. 25, 27 (1949), *overruled on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961):

> Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society as of any one time, even though, as a as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living

> principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

The panoply of federal constitutional rights afforded state criminal defendants today were only recognized during the last forty-one years of our 228 years nation. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963) (right to counsel). Even Even the constitutional rights to the effective assistance of counsel at trial and on appeal were not recognized until 1984 and 1985, respectively. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984); *Evitts,* 469 U.S. 387, 105 S.Ct. 830.

That the right to a mandatory full appeal in these cases is an integral part of every other state's criminal justice system is convincing evidence that it is essential to ensure that adjudications of guilt are correct.

It is no historical accident that "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States,* 318 U.S. 332, 347, 63 S.Ct. 608, 616 (1943). Moreover, "the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake." *McGautha v. California,* 402 U.S. 183, 309, 91 S.Ct. 1454, 1519 (1971) (Brennan, J., joined by Douglas and Marshall, J.J., dissenting). Given the interests at stake here, it requires no great leap of logic or adoption of revolutionary principle to insure via full appellate review that defendants sentenced to life without

parole receive fair trials, "which is this country's constitutional goal." *Pointer v. Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065, 1068 (1965).

What of the argument that the present system "works" because relatively few life without parole cases denied review are overturned by the federal courts? There are any number of reasons why federal habeas relief is not granted, not the least of which is that the Fourth Circuit typically has the lowest reversal rates in criminal cases. *See* Marc M. Arkin, *Rethinking the Constitutional Right To A Criminal Appeal,* 39 UCLA L. Rev. 503, 514-15 (1992) (pointing out that in 1989, 9.3 percent of the direct criminal appeals decided by the federal courts of appeals resulted in reversals, with the lowest percent of reversals in the Fourth Circuit, 4.7 percent). The Fourth Circuit is also the Court that held that the police's failure to administer the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966), is not a constitutional violation, *United States v. Dickerson,* 166 F.3d 667, 690 (4th Cir. 1999), which decision was subsequently reversed by the United States Supreme Court in an opinion by Chief Justice Rehnquist. *See Dickerson v. United States,* 530 U.S. 428, 120 S.Ct. 2326 (2000).

Moreover, indigent criminal defendants are not represented by counsel in federal habeas proceedings unless an evidentiary hearing is required and must navigate a minefield of procedural and substantive hurdles to obtain federal habeas relief. As one commentator noted:

> The Supreme Court's current decisions in the area of habeas corpus, however,

> raise troubling questions about the ability of federal habeas corpus to act as a backstop for truncated state appellate or collateral review. Recent Supreme Court decisions have limited the availability of federal collateral relief to state prisoners in a number of ways. (Footnote omitted.)

Arkin, supra, at 511-12. Judging the adequacy of this Court's discretionary review of cases by subsequent results in the Fourth Circuit is fallacious.

West Virginia is often looked upon as being economically or otherwise disadvantaged. It is no secret many of our young people are leaving the State and our population is declining. There are, of course, many reasons why our State may not compare favorably to other states in some areas. But this is not a position State legislative or executive officials have consciously chosen for the citizens of our State. In the judicial arena, we should not choose to be dead last in the nation in providing appellate review to our citizens in life without parole cases. As we begin a new century and millennium, should we not strive to provide the *best* judicial review for our citizens in these cases? There is a choice.

In 1997, this Court appointed a thirty-eight member Commission on The Future of The West Virginia Judiciary, and one of its recommendations (5.1(h)) was that "each litigant should be guaranteed one appeal-of-right either at the Intermediate Court of Appeals or at the Supreme Court." This Court should take a leadership role in achieving that goal

by granting appeals in cases involving life without parole sentences.

Additionally, we reiterate our previously-stated additional grounds for granting appeals in all life-without-possibility of parole cases:

We believe that the Court should give full appellate review, with full briefing and oral argument, to all cases involving life imprisonment without the possibility of parole, whether those cases are before us on direct appeal, or, as here, are before us on appeal from denial of habeas corpus relief where the original direct appeal was refused. Our reasons are somewhat overlapping.

First, without full state court appellate review, such criminal convictions do not have any sort of "stamp of approval" or presumption of correctness, in any subsequent or collateral proceeding — for example, in federal or state habeas corpus. As an example, this Court recently refused to review a life-with-no-parole murder conviction. *Then, the Supreme Court of the United States reversed this Court, saying that the conviction may have violated established constitutional law, and remanded the matter for further proceedings. Flippo v. W. Va.*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999). (Justice Starcher notes that he voted not to review this case, a vote of which he now repents.) The Supreme Court noted that *the last court to rule on the merits of the case was the Circuit Court of Fayette County.* We find this rather embarrassing — to have a West Virginia trial court's errors fixed by "the U.S. Supremes" — without this Court even taking a look at the issues first. Moreover, the day

may well come when the Supreme Court of the United States (or even this Court) requires full appellate review of such cases as a matter of due process. We would support such a position. If that day comes, this Court does not want to find itself in a position of having to deal with whether such a ruling might be retroactive.

Second, merely looking at the appeal petitions in these cases means we do not get the benefit of the West Virginia Attorney General's review — as is ordinarily the case when a petition is accepted, briefed, and argued. When there is a full review, the Attorney General's office will often recognize and acknowledge clear error when it is present — although they may argue that such error was harmless. And of course, we are equally often well-instructed by the Attorney General in supporting the State's position. Simply put, Attorney General involvement means better quality briefs and argument, and improves the quality of justice.

Third, full appellate review assures that important issues in these "life-without-the possibility-of-parole" cases are brought to the attention of the bar generally, and can be followed by interested lawyers. When cases are briefed and argued and an opinion is to be written, *amici* or other voices may ask to be heard on important issues.

Fourth, our criminal jurisprudence is better reasoned and developed when such cases are briefed and dealt with in an opinion. Where we uphold a conviction (as we do in most cases), opinion writing forces the Court to consciously recognize and articulate its reasoning. Additionally, as one of three co-equal branches of government, we have a duty to

reflect on what is going on in our court system and our broader society, that leads to such severe criminal sentences.

Fifth, when the Court accepts life-without-the-possibility-of-parole cases for full briefing and argument, we can (in appropriate cases) appoint new counsel, so that exceptionally important issues will be properly presented. It is apparent to us that some defendants do not have their issues well raised, due to inexperienced counsel preparing their petitions. Regrettably, but inescapably, the quality of an appeal petition can make some difference as to whether or not we accept a case for full argument.

Finally, we should have these cases argued and briefed because the consequences of error at trial are so extreme. In Illinois, since the reinstatement of the death penalty, as many people as have been executed have been *freed from death row,* due to trial errors. Here in West Virginia, we know all about the Fred Zain case. We know that trials *can* be unfair, and criminal convictions *can* be downright wrong. Where the sentence is one that deprives a person even of the *possibility* of parole, simple fairness means that we must take the steps that will try to detect any unfairness in the proceedings that led to the sentence.

We therefore dissent to the majority's decision to deny the right of full appellate review to all persons give life without parole sentences.

Chief Justice Davis and Justice Maynard voted to refuse the defendant's petition. For the reasons set forth below, Chief Justice Davis and Justice Maynard believe that the Court's

discretionary review procedure in cases involving a sentence of life without the possibility of parole is constitutionally sound.

1. This Court has affirmed the constitutionality of discretionary review in cases involving life without the possibility of parole. In *Billotti v. Dodrill,* 183 W. Va. 48, 394 S.E.2d 32 (1990), the defendant argued that discretionary review of cases involving life without the possibility of parole violated state and federal due process guarantees. This Court pointed out in *Billotti* that over one hundred years ago the United States Supreme Court had held in *McKane v. Durston,* 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894), "that appellate review is not an element of due process of law, and, consequently, that there is no constitutional right to an appeal." *Billotti,* 183 W. Va. at 52, 394 S.E.2d at 36.[1] In rejecting the defendant's challenge to our discretionary review procedure, we stated in *Billotti* that "[am examination of our own practice of reviewing petitions for appeal reveals that, although there are 'significant discretionary elements,' the procedure comports with the due process requirements of both the federal and state constitutions." 183 W. Va. at 53, 394 S.E.2d at 37.[2]

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[1] We also recognized in Syllabus point 1 of *Wing field v. Neal,* 60 W.Va. 106, 54 S.E. 47 (1906), in part, that "[aJn appeal was unknown to the common law."

[2] This Court observed in *State v. Legg,* 151 W.Va. 401, *404-05,* 151 S.E.2d 215, 218 (1966), "[o]ne convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error."

2. The Fourth Circuit has affirmed the constitutionality of our discretionary review in cases involving life sentences without the possibility of parole. In *Billotti v. Legursky,* 975 F.2d 113 (4th Cir. 1992),[3] the defendant argued "that due process requires an appeal as of right, with full review on the merits by the West Virginia Supreme Court of Appeals." 975 F.2d at 115. The Fourth Circuit rejected this argument and, in doing so, made the following observations:

> It is plain that West Virginia has afforded Billotti an adequate opportunity to challenge the alleged errors in his trial. The Fourteenth Amendment does not authorize the federal courts to micromanage state criminal justice systems. In our federal system, the states are allowed to structure their systems of criminal justice as they see fit, as long as their systems satisfy the basic demands of due process. There is often no one best way of doing things. . .
>
> Indeed, petitioner has not explained exactly how an appeal as of right would have increased the accuracy of the determination that he received. In many jurisdictions, appeal as of right is conducted without oral argument, with screening by staff attorneys, or with limited briefing. We cannot see how such streamlined systems deliver a

[3] This case and *Billotti v. Dodrill,* which was discussed previously, involved the same defendant.

> more meaningful opportunity to be heard than does West Virginia's system of discretionary appeals. West Virginia allowed Billotti to communicate his claims of legal error to the reviewing tribunal, accompanied by a record of the proceedings below necessary to evaluate his arguments. We believe that due process requires no more.

975 F.2d at 116-17 (internal citations omitted).[4]

3. It would be unfair to carve out a special review policy. Assuming, for the sake of argument, that this Court could carve out a special review policy for defendants sentenced to life without the possibility of parole, we believe such a policy would unfairly discriminate against all other litigants seeking an appeal to this Court. Every litigant petitioning for appeal believes that his or her case has merit and should be heard. Why should this Court have a policy of reviewing all cases involving life without the possibility of parole, but deny such treatment in termination of parental rights cases, child abuse and neglect cases, cases where million dollar verdicts have been awarded, or wrongful death cases where no liability was found?[5]

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[4] *See also Foster v. Hedrick*, 856 F.2d 186 (4th Cir. 1988) (unpublished table decision), *text reported at* 1988 WL 86674 (finding no due process violation in denial of petition for appeal in case involving life without possibility of parole).

[5] In their dissenting comments, Justice Albright and Justice Starcher have stated that this Court grants automatic review to cases involving punitive damages. To support this spurious statement they have cited to Syllabus points 2 and *5*

4. **Our system of discretionary review works.** Our system of discretionary review of cases involving a sentence of life without the possibility of parole works. Proof of this fact is found in the number of such cases overturned by federal courts. In our review of petitions filed to the United States Supreme Court by State criminal defendants, I found only one case involving a sentence of life without the possibility of parole where the Supreme Court disturbed this Court's disposition denying full appellate review. The case was *Flippo v. West Virginia,* 528 U.S. 11, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999). In reviewing opinions of the Fourth Circuit Court of Appeals, we did not discover any case where habeas relief was granted to a State defendant who had been sentenced to life without the possibility of parole and was denied full review by this Court. Finally, in our review of federal district court published decisions, we found only two cases where habeas relief was granted to defendants, who had been sentenced to life in prison, after we denied full review.[6] We believe this Court's record in federal

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of *Games v. Fleming Landfill, Inc.,* 186W. Va. 656, 413 S.E.2d 897 (1991). As members of this Court, Chief Justice Albright and Justice Starcher know full well that this Court has never interpreted *Games* as requiring acceptance of petitions for appeal in all punitive damages awards cases. Punitive damages cases are treated the same as all cases presented to this Court. Petitions for appeal that have merit are granted, and those without merit are denied. We made this point clear in Syllabus point 2 of. *Games* when we held that this Court will provide "a meaningful and adequate appellate review, *which may occur when an application is made for an appeal."* (Emphasis added).

[6] *See Kinder v. Boles,* 253 F. Supp. 817 (N.D. W. Va. 1966); *Holland v. Boles,* 225 F. Supp. 863 (N.D. W. Va. 1963). Neither case indicated whether the defendants were eligible for

courts speaks well of the integrity and thoroughness of our system of discretionary review of cases involving life without the possibility of parole.

5. **A majority of states provide for discretionary review by their highest courts.** In their dissenting comments, Justice Albright and Justice Starcher have indicated that "West Virginia is now the only state that does not guarantee a full appellate review to persons sentenced to life imprisonment without parole." This statement is grossly misleading. In our review of state statutes and court rules, we found that only in a minority of states does the court of last resort grant an appeal of right in criminal cases.[7] The majority of the states' highest courts provide for only discretionary review of criminal convictions, except for cases involving a sentence of death.[8] In two states, Oklahoma[9] and

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parole. The *Holland* defendant was subsequently retried and convicted of first degree murder. *See State v. Holland,* 149 W. Va. 731, 143 148 (1965).

[7] *See generally* Ark.R.S.Ct., Rule 1-2 (2004); Con. Gen. Stat. Ann. § 51-198 (Supp. West 2004); Del. Code Ann. tit. 10, § 142 (Michie 1999); Ga. Code Ann. § *5-6-34* (Supp. Lexis 2004); Idaho App. R., Rule 11 (2004); Ind. R. App. P., Rule *4(2005);* Kan. Stat. Ann. § 22-3601 *(1995);* Ky. R. Crim. P., Rule 12.02 *(2005);* Md. Code Ann., Cts. & Jud. Pro. § 12-301 (Lexis 2002); Minn. R. Crim. P., Rule 29.02 (2004); Mont. Code Ann. § 46-20-104 (Edwards 2003); Neb. Rev. Stat. § 29-2521.02 (1995); Nev. Rev. Stat. § 177.015 (2003); N.M.R. App. P., Rule 12-102 (2005); N.D. Cent. Code § 29-28-03 (Michie 1991); R.I. Gen. Laws § 12-19.2-5 (Lexis 2002); S.D. Codified Laws tit. 8B, § 23A-32-2 (Michie 1998); Utah Code Ann. § 78-2-2 (Lexis 2002); Vt. R. App. P., Rule 3 (2004); Wyo. Stat. Ann. § 7-12-101 (Lexis 2003).

[8] *See generally* Ala. S. Ct. R., Rule 39(a) (1996); Alaska Stat. § 22.05.010 (Lexis 2000); Ariz. Rev. Stat. Ann. § 12-120.24 (West 2003) & Ariz. R. Crim. P., Rule 31.19 (2005); Cal. Ct. R.,

Texas,'[10] the highest court cannot hear any criminal appeal—those states have special criminal appeal courts. [11] Further, noncapital punishment criminal appeals to the Texas Court of Criminal Appeals is purely discretionary with that court. Additionally, the state of Maine has a unique appellate system in that the highest court is required to review a criminal conviction,'[12] but has discretion to refuse a petition appealing a criminal sentence.

Rule 28 (Supp.West 2005); Cob. App. R., Rule 49 (2002); Fla. R. App. P., Rule 9.030(a) (2004); Haw. Rev. Stat. §~ 602-5 & 602-59 (1993); Ill. S. Ct. R. Crim. App., Rules 315, 603, 612(b) (2004); Iowa R. App. P., Rules 6.401 & 6.402 *(2005);* La. Code Crim. P., Art. 912.1 (Supp. West 2004); Mass. Gen. Laws Ann. ch. 211A, § 11 (West 1989); Mich. App. R., Rule 7.203 (2004); Miss. R .App. P., Rules 16 & 17 (2001); Mo. R. Crim. P., Rule 30.01 (2004); N.H. S. Ct. R., Rule 7 (2003); N.J.R. Gov. App. P., Rule 2:2-1 *(2005);* N.Y. Crim. Pro. Law § 450.90 (Supp. West 2003); N.C. Gen. Stat. § 7A-31 (Lexis 2003); Ohio Rev. Code Ann. § 2953.02 (Anderson 2003); Or. Rev. Stat. tit. 1, § 2.520 (2003); Pa. Stat. Ann. tit. 42, § 724 (West 2004); S.C. Code Ann. § 14-8-210 (Supp. Law. Co-op. 2004); Tenn. R. App. P., Rule 11(2004); Wis. S. Ct. I.O.P., I.O.P. 11(2005).

[9] *See* Okia. Const. Art. 7, § 4 (West 1981).

[10] *See* Tex. Gov. Code Ann. § 22.001(West 2004).

[11] *See* Okla. Crim. P., § *1051* (2005); Tex. R. App. P., Rule 66.2 (2004).

[12] See, Me. Rev. Stat. Ann. tit. 14, § 2115 (West 2003).

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRADLEY EARL HACKER,
Petitioner,

v.

THOMAS McBRIDE, Warden, Of the Department of Corrections for the State of West Virginia,
Respondent.
Civil Action No. 05-MISC-228
Judge James C. Stuckey

[Entered January 8, 2007]

ORDER

The Court, upon review of the Petitioner's Petition For Writ of Habeas Corpus and the Respondent's Answer to the Petition for Writ of Habeas Corpus, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Petitioner Bradley Earl Hacker is currently confined in the Northern Regional Correctional Facility, Moundsville, West Virginia, pursuant to his conviction for the felony murder of Jason Gill without a recommendation of mercy and the related offense of possession of marijuana with intent to deliver. Petitioner has been incarcerated since early February, 2002.

2. Petitioner, by counsel, appealed the jury verdict to the West Virginia Supreme Court of Appeals. This appeal was denied.

3. Thereafter, the Petitioner filed a petition for writ of habeas corpus relief, alleging only four grounds, namely: conviction obtained by knowing use of perjured testimony; newly obtained evidence of Petitioner's innocence; improper closing argument by the State of West Virginia; and ineffective assistance of counsel.

Trial, Conviction, Sentencing and Appeal

4. The case was tried before this Court from December 9 to 13, 2002. Evidence at the trial demonstrated that in the early morning hours o f January 20, 2002, Jason Gill was shot to death at a pullout by the Coral River on a dark country road near St. Albans, West Virginia. Mr. Gill's body was discovered eight days later in Lincoln County on a farm owned by John Frye's mother and father. John Frye was Petitioner's co-defendant.

5. Jason Gill had been shot three times, once in the back of the head.

6. Jason Gill's blood was on Petitioner's clothing and in his Jeep.

7. Petitioner's co-defendant, John Frye, who was at the same time awaiting trial on the same charge, did not testify at Petitioner's trial.

8. Nickey Don Smith was a witness at trial. Smith who was in the same housing unit or pod with Petitioner at South Central Regional Jail, testified to statements Petitioner purportedly related to Smith while the two were incarcerated together.

9. Smith testified that Petitioner said he, Petitioner, had fired one of the shots that killed Jason Gill.

10. Smith testified extensively about Petitioner' s apparent lack of remorse.

11. Petitioner did not take the stand at his trial.

12. At the close of evidence, the prosecution elected to merge the murder and robbery counts and to submit them as a single charge of felony murder.

13. Defense counsel did not move to bifurcate the guilt and penalty phase of the trial On December 13, 2002, the jury found Petitioner guilty of felony murder without a recommendation of mercy, as well as possession of marijuana with the intent to deliver.

14. On January 8, 2003, Petitioner was sentenced to consecutive terms of life imprisonment without mercy for the felony murder conviction and one to five years imprisonment for the related marijuana possession offense. Petitioner does not challenge the conviction for marijuana possession.

15. Petitioner appealed the judgment to the Supreme Court of Appeals of West Virginia, challenging the prosecution's allegedly unconstitutional comments in closing argument on Petitioner's decision not to testify. As appellant, Petitioner also asserted that the prosecution improperly vouched its case and urged the jury to exact revenge on Petitioner. The Supreme Court

declined 3-2 to accept the appeal. *State of West Virginia* v. *Hacker,* Pet. No. 031073 (Nov. 19, 2003).

16. Petitioner then appealed to the United States Supreme Court, challenging the prosecution's alleged unconstitutional comments on Petitioner's failure to testily. Certiorari was denied on May 17, 2004. *Hacker* v. *West Virginia,* 541 U.S. 1042 (May 17, 2004).

Post Conviction Testimony

17. Thereafter, the Petitioner filed a petition for writ of habeas corpus relief, alleging only four grounds, to wit: conviction obtained by knowing use of perjured testimony; new evidence of Petitioner's innocence; improper closing argument by the State of West Virginia; and ineffective assistance of counsel.

18. On March 31, 2006, an evidentiary hearing was held in the Kanawha County Circuit Court regarding the Petitioner's claims.

19. Petitioner first called as a witness John Frye, co-defendant of the Petitioner in the underlying criminal action. Frye testified that he was solely responsible for the murder of Jason Gill, the victim. Frye testified farther that the Petitioner's only assistance hi the commission of the crime was in the moving of the victim's body. Frye testified that the Petitioner only assisted him due to the petitioner's fear of Frye.

20. Thereafter, the Respondent called as a witness Michael Lee Conner, Jr., an inmate in the

Mount Olive Correctional Complex. Conner testified that he had been incarcerated with both the Petitioner and Frye at the facility. Conner testified that both Conner and the Petitioner engaged in numerous discussions regarding how the Petitioner might seek his release from prison. Conner testified that the Petitioner, Conner, and Frye conspired to fabricate a version of events that would falsely demonstrate the innocence of the Petitioner. Conner testified that Hacker made promises to both Conner and Frye that he would reward their assistance when he was released from prison.

21. The Respondent then called Erin Dillon, former girlfriend of the Petitioner. Dillon authenticated a letter that she had received from the Petitioner during his incarceration at the Mount Olive Correctional Complex wherein the Petitioner admitted to his continued association with Frye.

22. The Respondent then called trial counsel Gregory Campbell to testify on the issue of ineffective assistance of counsel. Campbell testified about the decision whether or not to seek a bifurcation of the trial into a guilt phase and a penalty phase. Campbell testified that he had been previously qualified as an expert in the area of criminal law by the Court, as well as other courts in the State of West Virginia. Campbell testified that the decision not to seek a bifurcated trial was made by the Petitioner after full disclosure of the consequences and a thorough investigation. Although Campbell testified that he could have sought bifurcation, the Petitioner failed to inquire as to what evidence could have been introduced to mitigate the punishment in a bifurcated trial.

Campbell testified that the decision not to seek bifurcation was a strategy decision made at the direction of the Petitioner.

23. Campbell also testified that his failure to object to prosecution remarks in closing was a strategy decision.

24. Campbell was questioned about his failure to rebut the testimony of Nickey Don Smith. Smith was a trial witness who was incarcerated with the Petitioner prior to trial. Smith testified as trial that the Petitioner admitted the crime to him and provided various details surrounding the event of the murder of Jason Gill. Campbell testified that, after a full investigation, he could not present any witnesses that could counter the testimony of Smith, and the record is clear as to trial counsel's diligent attempts to impeach Smith at trial.

25. The Petitioner then called as a witness Nickey Don Smith. Smith testified that he perjured himself at the trial of this matter. He testified that he was angry at the Petitioner over a debt and provided the trial testimony for revenge. He testified that he had heard rumors that the Petitioner wanted to have him "severely beat up" for having testified against the Petitioner. Smith also testified that he felt that the prosecution in his case did not fulfill their bargain with him and that he was manipulated by the prosecution.

26. The Respondent called Donald Morris, First Assistant Prosecuting Attorney for Kanawha County. Morris was one of the trial prosecutors in this matter. Morris strongly refuted the claim that

perjured testimony was used at trial. In fact, Morris testified that he spent a great deal of time with Nickey Don Smith to ascertain the credibility of his statement. Morris testified that Smith's statement was detailed, credible, and supported by the physical evidence of the crime.

27. The Petitioner did not testify at the evidentiary hearing. No evidence was presented by the Petitioner as to what mitigation evidence was extant at the time of the underlying trial. Finally, no evidence was presented by the Petitioner as to the nature and extent of any counted evidence that could have been presented in rebuttal to mitigation evidence.

CONCLUSIONS OF LAW

Knowing Use of Perjured Testimony

1. The Petition asserted that the State of West Virginia adduced false evidence at trial in the form of perjured testimony of a jailhouse informant, namely Nickey Don Smith. Smith testified at trial if this matter as to admissions of conduct by the Petitioner as it related to the murder for which the Petitioner had been charged.

2. Counsel for the Petitioner admitted at the evidentiary hearing that there was no evidence that perjured testimony was knowingly presented by the State of West Virginia, thus the Court analyzed the issue as what effect a post trial recantation has on a previous jury verdict.

3. The Court concludes that a post trial recantation should be considered newly discovered evidence in the absence of a showing of a knowing use of perjured testimony by the State of West Virginia.

4. The West Virginia Supreme Court of Appeals takes a dim view of petitions seeking a new trial based upon recantations:

> A new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special. State v. Nicholson. 170 W.Va. 701 (1982)
>
> and
>
> Although our Court has not discussed recantation testimony or affidavits as a form of newly discovered evidence, most courts hold that such testimony is exceedingly unreliable and untrustworthy, especially when it involves an admission of perjury. Nicholson, supra, citations omitted.

5. The test for whether a new trial should be granted based upon recantations or newly discovered evidence is well-settled:

> A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must

> appear to have been discovered since the trial, and , from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material., and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. State v. Stewart, 161 W.Va. 127 (1977).

6. Finally, the West Virginia Supreme Court of Appeals has held that "[o]nly under circumstances where there are credible corroborating circumstances that would lead the trial court to conclude that the witness did, indeed, lie at the first trial, can it be concluded that the fourth criterion of *Stewart* has been met." State v. Dudley, 178 W.Va. 122 (1987).

7. The Petitioner failed to present sufficient corroborating evidence to this court that would permit a conclusion that Nickey Don Smith lied at the Petitioner's trial. Conversely, evidence

was presented by the Respondent that there was a plethora of corroborating circumstances supporting Smith's original version of events.

8. This Court concludes that the circumstances surrounding this evidence are not sufficiently unusual to justify the relief sought.

New Evidence of Petitioner's Actual Innocence

9. "A confession by another person [to the crime] does not invariably require a new trial; the integrity of the confession is for the trial court." State v. King. 173 W.Va. 164 (1984).

10. This Court considered the following conflicting evidence: the confession of John Frye to the murder of Jason Gill; the denial of John Frye that the Petitioner had made any monetary promises to Frye; the testimony of Michael Conner, Jr. that Conner, Frye and the Petitioner conspired to fabricate a confession for Frye; the testimony of Conner that the Petitioner made promises of financial favors to Frye in exchange for his taking responsibility for the murder of Jason Gill; the testimony of John Frye that he purchased the new carpet fort the vehicle in which Jason Gill's body was transported despite the prior identity of the Petitioner as the purchaser of the same; and the inability of John Frye to explain the conduct of the Petitioner prior to the murder; the inability of John Frye to explain why the physical evidence of blood on the back of his jacket corroborated his original version of events that inculpated the Petitioner.

11. The Court also takes into consideration that John Frye did not come forward with this confession until January 2004.

12. In the light of the above, this Court is unable to find that the subsequent confession of John Frye is credible. Further, this Court finds that the Petitioner failed to overcome the fourth criterion of Stewart, supra, in that the Petitioner failed, on this issue, to present sufficient evidence that ought to produce an opposite result at a new trial.

Improper Closing Argument by the State of West Virginia

13. The West Virginia Supreme Court of Appeals has ruled many times on the issue of whether a new trial should be granted based upon allegations of improper prosecutorial remarks to a jury:

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters

> Syl. Pt 6, State v. Slugg, 193 W.Va. 338 (1995).
>
> and
>
> A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. Syl. Pt. 5, Slugg, supra.

14. In State v. Graham. 208 W.Va. 463, 541 S.E.2d 341 (2000), the Court also addressed the principles by which prosecutorial comments must be judged. The Court stated as follows:

> In reviewing allegedly improper comments made by a prosecutor during closing argument, we are mindful that "[c]ounsel necessarily have great latitude in the argument of a case," State v. Clifford, 58 W.Va. 681, 687, 52 S.E.864, 866 (1906) (citation omitted), and that "[u]ndue restriction should not be placed on a prosecuting attorney in his argument to the jury." State v. Davis. 139 W.Va. 645, 653, 81 S.E.2d 95, 101 (1954), *overruled, in part, on other grounds,* State v. Bragg, 140 W.Va. 585, 87 S.E.2d 689 (1955). Accordingly, "[t]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with the appellate court, unless it appears that the rights

> of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." State v Boggs, 103 W.Va. 641 (1927).

15. In State v Mills, 219 W.Va. 28 (2005), the West Virginia Supreme Court of Appeals addressed inflammatory prosecutorial remarks. In Mills, the prosecutor made numerous references to the death penalty in closing argument, equating "life without mercy" to "mercy" in a death penalty state. The Court held that, under a totality of the circumstances, these comments did not alter the result of the trial.

16. After a review of the comments made by the State of West Virginia as to "uncontroverted evidence" in the closing argument in this matter, this Court does not find that the Petitioner was clearly prejudiced as a result of such comments and that no manifest injustice has resulted by said comments.

17. Further, this Court finds in the totality of the circumstances that any alleged inflammatory remarks by the State of West Virginia in closing did not clearly prejudice the Petitioner or create a manifest injustice in the outcome of this trial.

Ineffective Assistance of Counsel

18. The standard for ineffective assistance of counsel as set forth in Strickland v. Washington, 104 S.Ct. 2050, 80 L.Ed. 2d 647 (1984) is as follows:

> Claims of ineffective assistance of counsel are to be governed by the two pronged test... (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different.

19. Furthermore, claims of ineffective assistance of counsel must virtually always be resolved in a habeas proceeding, since the Court is required to make findings of fact as to the strategic reasons behind trial counsel's actions. *See* State v. Triplett, 187 W.Va. 760 (1992), State v. Hutchinson, 215 W.Va. 313 (2004).

Failure to Seek Bifurcation

20 State v. Phelps, 197 W.Va. 713 (1996) affirms that "a unitary criminal trial in a first degree murder case meets muster under both the United States and West Virginia Constitutions."

21. It is further settled that a request for bifurcation is in the sound discretion of the trial court. *See* Phelps, supra; State v. LaRock, 196 W.Va. 294 (1996).

22 "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive unless no reasonably qualified defense attorney would have so acted in the defense of the

accused. State v. Frve, __ S.E. 2d __ (2006) WL 386363.

23. This Court finds no constitutional infirmity in the mere failure to request a bifurcated trial on the issue of mercy

24. This Court further concludes that sufficient evidence exists that the Petitioner was fully informed of his right to seek a bifurcated trial on the issue of mercy, and that the Petitioner made an informed decision not to seek a bifurcated trial.

25. This Court finds that such course of action, though apparently ill advised, nevertheless was the strategic decision of trial counsel and the Petitioner, and this Court shall not grant relief to the Petitioner due to his counsel's argued strategic error.

26. This Court finds a complete dearth of evidence by the Petitioner as to what, if any, mitigating evidence could have been presented, and what counter evidence would have been adduced by the State of West Virginia.

29. Finally, this Court finds that there is no reasonable probability that, but for any alleged errors, the outcome of the trial would have been different.

Failure to Put Forth a Defense

30. Rule 1.3 of the West Virginia Rules of Professional Conduct states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

31. This Court finds, as a matter of law, that trial counsel engaged in a diligent investigation of the underlying crime.

32. This Court further finds that trial counsel's attempted impeachment of State witness Nickey Don Smith was thorough and within the boundaries of the trial Court's evidentiary rulings.

33. This Court cannot adopt the assertion of the Petitioner that trial counsel permitted the "perjured" testimony of Nickey Don Smith to go unchallenged inasmuch as: a) the Petitioner has failed to adequately establish the credibility of Smith's recantation; and b) the Petitioner has failed to provide any counter evidence that could have been used to challenge the trial testimony of Smith.

ORDER

WHEREFORE, considering the above findings of fact and conclusions of law, this Court hereby ORDERS that the Petition for Writ of Habeas Corpus be dismissed and stricken from the docket of this Court.

The Court notes the objection and exception of the Petitioner to this ruling.

This is a Final Order.

The Court ORDERS the Circuit Clerk of Kanawha County to send a certified copy of this Order to all counsel of record.

Enter this Order the 5th day of January, 2007.
/s/ James C. Stucky
James C. Stucky, 13th Judicial Circuit

STATE OF WEST VIRGINIA

[Entered November 19, 2003]

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of November, 2003, the following order was made and entered:

State of West Virginia, Plaintiff Below,
Respondent

vs.) No. 031073

Bradley Earl Hacker, Defendant Below,
Petitioner

On a former day, to-wit, May 22, 2003, came the petitioner, Bradley Earl Hacker, by Bryant Spann, Allen Guthrie McHugh & Thomas; Gregory J. Campbell, Campbell & Turkaly; and S. Benjamin Bryant, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 9th day of January, 2003, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

Chief Justice Starcher and Justice Albright would grant the defendant's petition and would have this matter fully briefed and set on the argument docket. They state, as grounds for this position, as follows:

We believe that the Court should give full appellate review, with full briefing and oral argument, to all cases involving life imprisonment without the possibility of parole, whether those cases are before us on direct appeal, or, as here, are before us on appeal from denial of habeas corpus relief where the original direct appeal was refused. Our reasons are somewhat overlapping.

First, without full state court appellate review, such criminal convictions do not have any sort of "stamp of approval" or presumption of correctness, in any subsequent or collateral proceeding — for example, in federal or state habeas corpus. As an example, this Court recently refused to review a life-with-no-parole-murder conviction. *Then, the Supreme Court of the United States reversed this Court, saying that the conviction may have violated established constitutional law, and remanded the matter for further proceedings. Flippo v. W. Va.,* 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999). (Chief Justice Starcher notes that he voted not to review this case, a vote of which he now repents.) The Supreme Court noted that *the last court to rule on the merits of the case was the Circuit Court of Fayette County.* We find this rather embarrassing -- to have a West Virginia trial court's errors fixed by "the U.S. Supremes" — without this

Court even taking a look at the issues first. Moreover, the day may well come when the Supreme Court of the United States (or even this Court) requires full appellate review of such cases as a matter of due process. We would support such a position. If that day comes, this Court does not want to find itself in a position of having to deal with whether such a ruling might be retroactive.

Second, merely looking at the appeal petitions in these cases means we do not get the benefit of the West Virginia Attorney General's review — as is ordinarily the case when a petition is accepted, briefed, and argued. When there is a full review, the Attorney General's office will often recognize and acknowledge clear error when it is present — although they may argue that such error was harmless. Simply put, Attorney General involvement means better quality briefs and argument, and improves the quality of justice.

Third, full appellate review assures that important issues in these "life-without-the-possibility-of-parole" cases are brought to the attention of the bar generally, and can be followed by interested lawyers. When cases are briefed and argued and an opinion is to

be written, *amid* or other voices may ask to be heard on important issues.

Fourth, our criminal jurisprudence is better reasoned and developed when such cases are briefed and dealt with in an opinion. Where we uphold a conviction (as we do in most cases), opinion writing forces the Court to consciously recognize and articulate its reasoning. Additionally, as one of three co-equal branches of government, we have a duty to reflect on what is going on in our court system and our broader society, that leads to such severe criminal sentences.

Fifth, when the Court accepts life-without-the-possibility-of-parole cases for full briefing and argument, we can (in appropriate cases) appoint new counsel, so that exceptionally important issues will be properly presented. It is apparent to us that some defendants do not have their issues well raised, due to inexperienced counsel preparing their petitions. Regrettably, but inescapably, the quality of an appeal petition can make some difference as to whether or not we accept a case for full argument.

Finally, we should have these cases argued and briefed because the consequences of error at trial are so extreme. In Illinois, since the reinstatement of the death penalty, as

> many people as have been executed have *been freed from death row,* due to trial errors. Here in West Virginia, we know all about the Fred Zain case. We know that trials can be unfair, and criminal convictions can be downright wrong. Where the sentence is one that deprives a person even *of the possibility* of parole, simple fairness means that we must take the steps that will try to detect any unfairness in the proceedings that led to the sentence.

Justices Davis and Maynard voted to refuse the defendant's petition. For the reasons set forth below, Justices Davis and Maynard believe that the Court's discretionary review procedure in cases involving a sentence of life without the possibility of parole is constitutionally sound.

> **1. The Court has affirmed the constitutionality of discretionary review in cases involving life without the possibility of parole.** In *Billotti v. Dodrill,* 183 W. Va. 48, 394 S.E.2d 32 (1990), the defendant argued that discretionary review of cases involving life without the possibility of parole violated state and federal due process guarantees. This Court pointed out in *Billotti* that over one hundred years ago the United States Supreme Court had held *mMcKane v. Durston,* 153 U.S. 684,14 S. Ct. 913,38 L. Ed. 867 (1894), "that appellate review is not an element of due process of law, and, consequently, that there is no constitutional right to an appeal." *Billotti,* 183 W. Va. at 52, 394 S.E.2d at 36. We

recognized in syllabus point 1 of *Wingfield v. Neal,* 60 W. Va. 106,54 S.E. 47 (1906), in part, that "[a]n appeal was unknown to common law." In rejecting the defendant's challenge to our discretionary review procedure, we held in *Billotti* that "[a]n examination of our own practice of reviewing petitions for appeal reveals that, although there are 'significant discretionary elements,' the procedure comports with the due process requirements of both the federal and state constitutions." 183 W. Va. at 53, 394 S.E.2d at 37. This Court recognized in *State vs. Legg,* 151 W. Va. 401,151 S.E.2d 215,218(1966), "[o]ne convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error."

2. **The Fourth Circuit has affirmed the constitutionality of our discretionary review in cases involving life sentences without the possibility of parole.** In *Billotti v. Legursky,* 975 F.2d 113 (4th Cir. 1992), (this case and *Billotti v. Dodrill,* which was discussed previously, involved the same defendant), the defendant argued "that due process requires an appeal as of right, with full review on the merits by the West Virginia Supreme Court of Appeals." 975 F.2d at 115. The Fourth Circuit rejected this argument and, in doing so, made the following observations: It is plain that West Virginia has afforded Billotti an adequate opportunity to challenge the alleged errors in his trial. The Fourteenth Amendment does not authorize

the federal courts to micro manage state criminal justice systems. In our federal system, the states are allowed to structure their systems of criminal justice as they see fit, as long as their systems satisfy the basic demands of due process. There is often no one best way of doing things. . . .

Indeed, petitioner has not explained exactly how an appeal as of right would have increased the accuracy of the determination that he received. In many jurisdictions, appeal as of right is conducted without oral argument, with screening by staff attorneys, or with limited briefing. We cannot see how such streamlined systems deliver a more meaningful opportunity to be heard than does West Virginia's system of discretionary appeals. West Virginia allowed Billotti to communicate his claims of legal error to the reviewing tribunal, accompanied by a record of the proceedings below necessary to evaluate his arguments. We believe that due process requires no more.

Billotti, 975 F.2d at 116-117 (internal citations omitted). *See also Foster v. Hedrick,* 856 F.2d 186 (4th Cir 1988) (unpublished opinion) (finding no due process violation in denial of petition for appeal in case involving life without possibility of parole).

3. **It would be unfair to carve out a special review policy.** Assuming, for the sake of argument, that this Court could carve out a special review policy for defendants sentenced

to life without the possibility of parole, 1 believe such a policy would unfairly discriminate against all other litigants seeking an appeal to this Court. Every litigant petitioning for appeal believes that his or her case has merit and should be heard. Why should this Court have a policy of reviewing all cases involving life without the possibility of parole, but deny such treatment in termination of parental rights cases, child abuse and neglect cases, cases where million dollar verdicts have been awarded, or wrongful death cases where no liability was found?

4. **Our system of discretionary review works.** Our system of discretionary review of cases involving a sentence of life without the possibility of parole works. Proof of this fact is found in the number of such cases overturned by federal courts. In my review of petitions filed to the United States Supreme Court by State criminal defendants, I found only one case involving a sentence of life without the possibility of parole where the Supreme Court disturbed this Court's disposition denying full appellate review. The case was *Flippo v. West Virginia,* 528 U.S. 11, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999). In reviewing opinions of the Fourth Circuit Court of Appeals, I did not discover any case where habeas relief was granted to a State defendant who had been sentenced to life without the possibility of parole, and was denied full review by this Court. In my review of federal district court published decisions, I found only

two cases where habeas relief was granted to defendants, sentenced to life in prison, after we denied full review. Neither case indicated whether the defendants were eligible for parole. *See Kinder v. Boles,* 253 F.Supp 817 (N.D. W. Va. 1966); *Holland v. Boles,* 225 F.Supp. 863 (N.D. W. Va. 1963. The *Holland* defendant was subsequently retried and convicted of first degree murder. *See State v. Holland,* 149 W. Va. 731, 143 S.E.2d 148 (1965). I believe this Court's record in federal courts speaks well of the integrity and thoroughness of our system of discretionary review of cases involving life without the possibility of parole.

A True Copy
Attest: /s/
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF KANAWHA COUNTY,

STATE OF WEST VIRGINIA

v.

BRADLEY EARL HACKER

CRIMINAL NO. 02-F-295; Ct. 1 & Ct. 3
JUDGE JAMES C. STUCKY

[Entered January 8, 2003]

ORDER

On the 8th day of January, 2003, came the defendant, **BRADLEY EARL HACKER,** having been found guilty by a jury on the 13th day of December, 2002, to the felony offenses of First Degree Murder in the Commission of First Degree Robbery and Possession with Intent to Deliver a Schedule 1 Controlled Substance to wit: Marijuana, provable offenses as contained in Count One and Count Three of said Indictment No. 02-F-295, appeared in Court in the custody of the Sheriff, together with his Counsel, Gregory J. Campbell and S. Benjamin Bryant, and also came the State of West Virginia by Kimberly P. Hindman and Donald P. Morris, Assistant Prosecuting Attorneys in and for Kanawha County, West Virginia.

THEREUPON, it was demanded of the said **BRADLEY EARL HACKER**, if anything he had or knew to say why the Court should not now proceed to pronounce the sentence of the law against him,

and no valid reason being offered or alleged in delay of judgment, it is considered by the Court as follows:

02-F-295: Count 1: That the defendant, **BRADLEY EARL HACKER**, be committed to the custody of the West Virginia Department of Corrections for the rest of his natural life, with credit for time spent in jail while awaiting trial and conviction, which credit for time spent is 341 days.

02-F-295: Count 3: That the defendant, **BRADLEY EARL HACKER**, be committed to the custody of the West Virginia Department of Corrections for an indeterminate term of not less than one (1) year nor more than five (5) years, said sentence to run **CONSECUTIVE** to and not concurrent with the sentence imposed by this Court in Count 1 of Indictment No. 02-F-295.

It is further **ORDERED** that the proper officer do, as soon as practicable, remove and safely convey the said BRADLEY EARL HACKER from the South Central Regional Jail to the custody of the West Virginia Department of Corrections, to be kept imprisoned and maintained in the manner prescribed by law.

WHEREUPON, the prisoner was remanded to the South Central Regional Jail.

TO ALL OF WHICH COUNSEL FOR THE DEFENDANT OBJECTS AND EXCEPTS.

Enter this 8th day of January, 2003.

/s/ James C. Stucky
JAMES C. STUCKY Circuit Judge

Thirteenth Judicial Circuit

INSPECTED BY:

/s/
PROSECUTING ATTORNEY

/s/
COUNSEL FOR DEFENDANT

COMMITMENT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
V.
BRADLEY EARL HACKER.

CRIMINAL ACTION NO. 02-F-295

[Entered January 8, 2003]

ON THIS 8th day of January, 2003 came the attorney for the State and the defendant appearing in person and represented by Gregory J. Campbell and S. Benjamin Bryant, his counsel.

IT IS ADJUDGED that the defendant having been found guilty by a jury on the 13th day of December, 2002, has been convicted of the offenses as charged: 02-F-295 Count 1, First Degree Murder in the Commission of First Degree Robbery, and 02-F-295 Count 3, Possession with Intent to Deliver a Schedule 1 Controlled Substance to wit: Marijuana, and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Department of Corrections for imprisonment for a period of: 02-F-

295 Count 1, for the rest of his natural life, with credit for time spent in jail while awaiting trial and conviction, which credit for time spent is 341 days, and 02-F-295 Count 3, for an indeterminate term of not less than one (1) nor more than five (5) years, said sentence to run CONSECUTIVE to and not concurrent with the sentence imposed by this Court in Count 1 of Indictment No. 02-F-295.

CONVICTION DATE: December 13, 2002

SENTENCE DATE: January 8, 2003

EFFECTIVE SENTENCE DATE: February 1, 2002

IT IS ADJUDGED THAT: **SEE CERTIFIED COPY OF ORDER ATTACHED.**

IT IS ORDERED that the Clerk forthwith transmit this record, duly certified, of the judgment and commitment to the Warden of the West Virginia Penitentiary and that their record serve as the commitment of the defendant.

JAMES C. STUCKY /s/ JAMES C. STUCKY
JUDGE
CATHY S. GATSON /s/ CATHY S. GATSON
CLERK
JANE A. VREDEVELD /s/ JANE A. VREDEVELD
DEPUTY CLERK
Certified this 9th day of January, 2003.
SEAL:

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. _____

BRADLEY EARL HACKER,
Petitioner,

v. CASE NO. 05-MISC-228

THOMAS L. McBRIDE, Warden,
Mount Olive Correctional Complex,
Respondent.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY

PETITION FOR APPEAL

Benjamin L. Bailey (WVSB#200)
Deirdre H. Purdy (WVSB#7779)
Bailey & Glasser. LLP
227 Capitol Street
Charleston, West Virginia 25301
(304) 345-6555
(304) 342-1110 facsimile

* * *

C. The Court Erred in Holding that Defense Counsel's Failure to Move to Bifurcate was not Ineffective Assistance of Counsel.

A defendant has the constitutional right to effective representation by counsel under both the West Virginia and United States Constitutions. Art. III § 14, W. Va. Constit.; Amend. VI, U.S. Constit. Claims of ineffective assistance of counsel are governed by the two-pronged test established in *Strickland v. Washington,* 466 U.S. 668 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. pt. 5, *State v. Miller,* 194 W. Va. 3, 459 S.E.2d 114 (1995).

Defense counsel Greg Campbell failed to move to bifurcate the guilt and penalty phases of Petitioner's trial. This failure was deficient under the objective standards this Court has previously set forth.

Counsel's assistance is not ineffective when it arises or is explicable as strategy, tactics or an arguable course of action. *See, e.g., State v. Thomas,* 157 W. Va. 640, 666, 203 S.E.2d 445, 460 (1974). Campbell acknowledged, however, that there was no strategic, tactical or legal reason not to move to bifurcate. "Other than my client's wishes, none that I can think of." Hrg. tran. at 136. "[I]n retrospect," Campbell testified, "I'd beat him on the head to bifurcate." *Id.* at 140. Campbell could think of nothing that Petitioner gained by the motion to

bifurcate not being made. *See Id.* at 141. By counsel's own admission, this was not a strategic or tactical decision.

There is no strategic or tactical reason not to move to bifurcate a criminal jury trial. The structural problems that create compelling prejudice[1] were set forth eloquently by Justice Neely in his dissent in a case involving a unitary murder trial:

> Since evidence of mitigation can only be taken as a confession of guilt, the criminal defendant will frequently be forced, as a matter of strategy, to curtail or eliminate his presentation of evidence on mitigating circumstances. Any such compelled choice undeniably burdens the criminal defendant's right to be heard on the issues of punishment and sentence.
>
> On the other hand, a criminal defendant who chooses, from necessity, to introduce evidence on mitigation suffers the loss of his right to have the State prove its case beyond a

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[1] A trial court has enormous discretion in its decision to bifurcate a trial. *State v. LaRock*, 196 W. Va. 294, 315, 470 S.E.2d 613, 634 (1996). If the motion to bifurcate had been made, it would have been an abuse of that discretion for the court to deny the motion, only if there was "compelling prejudice." *Id.* "'Compelling prejudice' exists where a defendant can demonstrate that without bifurcation he or she was unable to receive a fair trial regarding the finding of mercy and that the trial court could afford no protection from the prejudice suffered." *Id.*

> reasonable doubt while he stands mute and offers no evidence on the issue of innocence. This is the time-tested way of securing a jury acquittal and as the right is constitutionally guaranteed to a defendant, any procedure which circumscribes its use is inherently unconstitutional.[ ]

State ex rel. Rasnake v. Narick, 159 W. Va. 542, 553, 227 S.E.2d 203, 207-09 (1976) (Neely, J., dissenting).

At the evidentiary hearing, defense counsel agreed with all these concerns, and further acknowledged that they affected Petitioner's trial. Campbell agreed with Petitioner's claim that "Evidence of mitigation is essentially admission of guilt." "In the main, I agree with that, yes[,]" Campbell said, it is "hard to try a case saying that you didn't do it, and to put on mitigating evidence at the same time." *Id.* at 111. Campbell testified about a unitary murder trial that "It's not the best procedure in the world. *Id.* at 108. He explained, "You know, it used to be when you tried a murder case, that your defense was 'I didn't do it, but if you – if you think I'm kidding and I did do it, here's some mitigating witnesses.' It was hard to do." *Id.* at 109.

No mitigating evidence was presented. In fact, no defense was offered at all. The Court correctly instructed that a defendant with a recommendation of mercy would be eligible for parole in fifteen years, and otherwise he would serve life in prison. The prosecutor urged the jury to show

no mercy.[2] Defense counsel could only beg, "If you come to the conclusion that he is [guilty], I beg you to add the mercy."

There are no strategic or tactical reasons not to move to bifurcate and defense counsel agreed there were none. Instead, counsel contended that he relied on his client's decision and choice. The *Rules of Professional Conduct* address such reliance. Rule 1.2(a) provides:

> A lawyer shall abide by a client's decisions concerning the objectives of representation . . .and shall consult with the client as to the means by which they are to be pursued. . . . In a

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[2] In fact, the prosecutor improperly urged the jury to exact revenge on Petitioner: "And I ask you when you go back there and deliberate and are deciding whether or not to grant him mercy, you show him the same amount of mercy he showed Jason Gill when he was gunned down that night, torched and buried in a shallow grave." Tr. 1001: 11-16. Federal and state courts condemn precisely this inflammatory argument. *See, e.g., Lesko v. Lehman*, 925 F.2d 1527, 1540 (3d Cir. 1991); *Richardson v. State*, 604 S.2d 1107, 1109 (Fla. 1992). Both *Lesko* and *Richardson* condemn precisely such language, where a prosecutor incites jurors to reach an irrational sentencing decision by asking jurors to show the defendant as much "mercy" or "pity" as he showed his victim. *Id.* Because the jury is an organ of the court system and thus of the State itself, it should reach careful, rational decisions based on the facts and the law. What it may not do is precisely what the prosecutor asked in this case -- to assume the vicious mindset of a murdering mob. A prosecutor exceeds the bounds of permissible advocacy when she "implore[es] the jury to make its death penalty determinations in the cruel and malevolent manner shown by the defendants when they tortured and drowned [one victim] and shot [another]." *Lesko*, 925 F.2d at 1545.

> criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Id. The decision whether to move to bifurcate the guilt and penalty phases of a first-degree murder trial is not one of those decisions listed where it is mandatory that a lawyer abide by his client's wishes.

This Court has given further direction on the question, holding that "[c]ounsel is not ineffective when, following directions from his client, he does not appeal the client's criminal conviction, where the client's choice involves no legal judgment that the lawyer should overrule." *Asbury v. Mohn*, 162 W. Va. 662, 666, 256 S.E.2d 547, 549 (1979)(emphasis added). Again in *State v Glover*, this Court reiterated the distinction betw n clients' directives involving no legal judgment and those involving legal judgment. 183 W. Va. 431, 396 S.E.2d 198 (1990). In G*lover*, the client directed counsel not to file a timely notice of alibi, a legal judgment. The Court held that the failure to file the notice "cannot be excused on the ground that [counsel] was relying on the defendant's instructions" where the issue involved a legal judgment *Id.*, 183 W. Va. at 435, 396 S.E.2d at 202.

By counsel's own admission, in the instant case there was no strategic, tactical or legal reason not to move to bifurcate and every reason to do so. Clearly counsel is required to overrule the defendant's ostensible desire not to bifurcate the trial and impose the appropriate legal judgment.

Counsel also acknowledged that, but for the decision not to move to bifurcate, there was a reasonable probability the outcome would have been different. "I think it could have made a difference between with and without mercy. . . . I think it very well could have made a difference between with and without." Hrg. tran. at 143-44.

The *habeas* court held that defense counsel's relying on defendant's decision not to bifurcate "though apparently ill advised, nevertheless was the strategic decision of trial counsel and the Petitioner, and this Court shall not grant relief to the Petitioner due to his counsel's argued strategic error." Order at 11, ¶ 25. As noted, there is no strategic reason to make such a decision and even defense counsel could think of none and did not claim that he made that decision for any strategic reason. Further, it is a decision involving legal judgment and for that reason, not a decision that can be left to Petitioner. The Court below is correct that the decision was "ill advised."

After the unitary trial and with no presentation of mitigating evidence, there was little more that defense counsel could have said. The motion to bifurcate would have served one crucial purpose: it would have put a time between the evidence of guilt and the prejudicial testimony of Nickey Don Smith and the separate evidence and argument on the proper penalty. At a separate sentencing hearing, Petitioner could have put on evidence tending toward mercy: character witnesses could have testified, the defendant himself might have taken the stand. The Court below found "a complete dearth of evidence by the Petitioner as to

what, if any, mitigating evidence could have been presented, and what counter evidence would have been adduced by the State of West Virginia." Order at 11, ¶ 26. But that is not the issue. The issue is not whether, had a jury heard certain evidence, it might have granted mercy. The issue is whether there was compelling prejudice in defendant's inability to present any evidence in mitigation at all without appearing to confess guilt. Without that possibility there was compelling prejudice.

Petitioner moves this Court to find that the decision below was clearly erroneous with regard to whether the decision not to bifurcate was a strategic decision. It was not and could not have been. The decision below was also error because the Court failed to apply the rule of law that an erroneous legal judgment cannot be left to a client, but must be overruled by counsel. The failure to bifurcate reasonably led to the loss of the recommendation of mercy for Petitioner. Ineffective assistance of counsel is a violation of Petitioner's constitutional right and must be corrected by a hearing on the issue of mercy, which would allow Petitioner to present all the evidence in mitigation currently available, including the testimony of John Frye and Nickey Don Smith.

* * *

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRADLEY EARL HACKER,
Petitioner,
v. Civil Action No: 05-MISC-228

(The Honorable James C. Stucky)

THOMAS L. McBRIDE, Warden,
of the Department of Corrections
for the State of West Virginia,
Respondent.

EVIDENTIARY HEARING - PETITIONER'S WRIT OF HABEAS CORPUS

The following is a transcript of the proceedings held on the 31st day of March, 2006, beginning at 9:13 a.m. before the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, 13th Circuit, West Virginia, and before Karen D. King, Certified Court Reporter and Notary Public in and for the State of West Virginia, pursuant to written agreement for the purposes of the above-styled civil action.

APPEARANCES
On Behalf of the Petitioner:
DEIRDRE H. PURDY, ESQUIRE
BENJAMIN L. BAILEY, ESQUIRE
Bailey & Glasser
227 Capitol Street
Charleston, West Virginia 25301
(304) 345-6555

On Behalf of the Respondent:
WILLIAM R. VALENTINO, ESQUIRE
DONALD P. MORRIS, ESQUIRE
Geary Plaza - 4th Floor
700 Washington Street East
Charleston, West Virginia 25301
(304) 357-0300

THE COURT: Thank you.

(WHEREUPON, Witness Erin Dillon was excused from the witness stand and stepped aside.)

THE COURT: Call your next witness.

MR. VALENTINO: Mr. Campbell is on his way over, Judge. I just talked to him about five minutes ago, and he said that he was on his way.

MALE SPEAKER: He's here.

MR. VALENTINO: Okay. He's out in the hall, Judge.

(WHEREUPON, MR. Valentino exited the courtroom to retrieve Mr. Campbell.)

THE COURT: Mr. Campbell, if you'll come forward and be sworn in by the clerk right here, please. (Indicating.)

(Witness sworn.)

THE COURT: And if you'll have a seat in the witness box, please.

THEREUPON came,

GREGORY J. CAMPBELL,

called as a witness on behalf of the respondent herein, having been sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. VALENTINO:

Q Mr. Campbell, can you state your full name for the record, please.

A Gregory J. Campbell.

Q Okay. And you are an attorney practicing before the Bar of Kanawha County?

A Yes, sir.

Q Okay. And how long have you been an attorney in Kanawha County?

A I'm in my 33rd year.

Q Okay. And during those 33 years, how many criminal cases have you been involved in as defense counsel?

A Involved in, or tried?

Q Tried. Let's start with tried, and I know that you'll never be able to count the ones that you were involved in, so let's say, how many cases you've tried?

A 125, 150, maybe.

Q And have you ever testified as an expert before in any ancillary proceedings on the issues of your expertise in the area of criminal law?

A I have in this court and others.

Q Okay. And you were qualified as an expert

A I'm talking about a unified trial for murder.

Q And -- But you discussed that with Mr. Hacker?

A Yes.

Q Okay. And you fully informed him of the consequences of his decision?

A Well, I explained to him what a bifurcated trial was and how it worked. I explained to him how, just generally speaking, a criminal trial would work where it's not a bifurcated.

Q Okay.

A The -- You know, it used to be when you tried a murder case, that your defense was "I didn't do it, but if you -- if you think I'm kidding and I did do it, here's some mitigating witnesses." It was hard to do.

Q Okay. And the question that -- I'm sorry, I was reading your closing argument there. The question that I asked though, that was discussed with Mr. Hacker -- Did you ever discuss this case with anyone else in his family or just with Mr. Hacker?

A We had meetings -- several meetings with the family at Earl's -- Brad's home, at his house. And, you know, you've got the attorney/client privilege, so I -- you couldn't discuss things that Brad told us, but you could discuss issues, and problems, and strategies, and what we -- what we had found out.

Q So did you talk to them about his character?

A Well, we had a lot of information from the family -- I mean, from -- about Brad from the time of birth to the time that he got arrested. I mean, what he did, and where he worked, and where he went to school. He was quite a golfer about -- I think he went to some golfing school, friends that he had, things that he did -- I mean, the family -- had some sisters and his mom and his dad, and –

Q So you weren't totally in the dark with regard to witnesses that could have been called to testify about his character?

A No .

Q Okay. And it was a result of this decision not to seek a bifurcated trial that you made then that decision not to call character witnesses?

A Yes.

Q Okay. Ms. Purdy put in her petition, "Evidence of mitigation is essentially admission of guilt." Do you agree with that statement?

A In the main, I agree with that, yes. As I say, it was -- You know, I refer to them in the old

days -- I mean, when *I* first tried -- started trying murder cases, you couldn't bifurcate, maybe you could, it certainly wasn't -- there wasn't LaRock. and it was hard to say -- if your defense was "I didn't do it," as opposed to self-defense or something like that, it was hard to try a case saying that you didn't do it, and to put on mitigating evidence at the same time --

Q Okay.

A -- before a jury.

Q And Mr. Hacker alleges that he was then -- as a result of that statement, was prevented from offering such evidence at trial -- of a trial on the merits -- mitigation evidence. Is it your position that he was prevented somehow by you from offering mitigation witnesses?

A No -- *I* mean, we went over what witnesses we were going to call, if any. I think that we decided not to call any.

Q Okay. And you did not call any witnesses. Was that a decision that was made with Mr. Hacker?

A Well, I'm sure that it was. I mean, we kept him -- there was me, there was Ben, I had a paralegal, Ben had a paralegal -- I mean, we had meetings in the mornings, we had meetings a noon, we had meetings afterwards. I mean, we had -- He was informed the whole way.

Q Okay. Well, I guess that's what I'm asking you is that these decisions that you're talking about with regard to bifurcation, with regard to

putting on a mitigation case in a unified trial, you weren't asleep during that, were you? I mean, did –

A No.

Q Okay. So you had active participation in that, Mr. Hacker had active participation in those decisions?

A Yes.

Q Okay. And for him to say that he was prevented from -- you know, well, necessarily prevented from offering mitigation evidence at trial, that's not true.

A Technically, correct, yes.

Q Okay. You read the remainder of her – of you -- I suppose that Mr. Hacker has never told you that he committed this murder, did he?

A That's correct.

Q Okay. He always asserted that someone else did it?

A That's correct.

MR. VALENTINO: That's all that I have for Mr. Campbell, Judge.

THE COURT: Any cross?

MR. BAILEY: A little bit.

THE COURT: Mr. Bailey.

(WHEREUPON, there was an inaudible discussion held between Mr. Bailey and Ms. Purdy.)

CROSS-EXAMINATION

BY MR. BAILEY:

Q Good morning, Mr. Campbell.

A Good morning, Mr. Bailey.

Q What did you do to prepare to testify here, anything?

A I read the petition yesterday.

Q Is that it?

A Yes, sir.

Q Did you talk with Mr. Valentino or Mr. Morris at all about why they wanted you to even thought at the time that this is a case that could have been successfully bifurcated.

Q What reasons would there be not to bifurcate this trial?

A Well, I had a statement coming in; I had Nickey Don Smith; I didn't have a co-defendant; I didn't have a flank open; you know, I didn't have a codefendant testifying against me or anything. I thought that we would have a -- What was your question?

Q What reasons would there be, given all of those things that you just said, for not bifurcating? Can you think of any good ones?

A Other than the fact, as stated in the brief, that sometimes when you bifurcate and put on evidence, that it's an admission of guilt. I don't think

that that's a good reason though. I thought that it was a case that could have been successfully bifurcated.

Q I don't think you got my question.

A Okay.

Q I'm sorry. I mean, what you just mentioned is a reason why you would bifurcate, right? Because he can't try to mitigate while -- you don't want to sit there and say, "Well, I did it," as you told us. "I didn't do it, but if it did happen, I'm really not a bad person." You can't do that in front of a jury credibly, right? It's hard.

A It's hard to do.

Q And assuming that that's the case, there really wasn't any reason in this case, any strategic or legal reason, not to bifurcate and preserve the opportunity to put all of the mitigation stuff on in full to another jury later, right?

A Other than my clients wishes, none than I can think of.

Q Mr. Valentino asked you a question about whether Mr. Hacker approved of the decision not to call witnesses, and you said, "That's technically correct," was your answer. Do you remember that?

A No. I mean, I don't remember it. It's a --

Q (Interposing.) I didn't know what technically correct" meant.

A Well, we had discussed -- especially after the State rested, but long before trial started -- what we were going to do, what witnesses we would or could call as a defense.

And, Ben, I can't remember, but I cannot remember that we had witnesses lined up and didn't call them. It could very well have been that we knew that we didn't have witnesses unless something popped up during the trial, like a rebuttal -- or somehow get a witness.

I don't know if, before the trial, we knew that we didn't have witnesses to put on.

Q Do you recall if you had witnesses subpoenaed?

A No, I don't. But I do know this, I mean, we talked to him every morning; we talked to him at every break; we talked to him every evening – I mean, just like you do.

I mean, we -- "This is what we've done; this is what happened; this is what we're doing; this is what's next." You know, "Have you got any questions? What do you want to do?"

Q Okay. Do you think that there are some decisions that the lawyer has to make over the client's objections?

A Sure. I mean, some — an easy one is an ethical decision. You know, he says, "Well, look, even though I told you that I did it, I think I'll testify anyhow."

And my question is: Well, what are you going to testify to? And, of course, if he says, "Well, I'm going to testify that I did it," then you're going to talk to them, and if they say, "No," I'm going to go up there and testify that I didn't do it," and you say, "No, I can't let you do that. You're not going to get on the stand, or I'm out of here."

Q Right.

A Probably if I'm going -- I'm going to look real closely at a client making decisions and stuff if I think that there might be some sort of a mental problem, if that's your defense or something.

I don't know if it's right or wrong, but usually the way that I say that I'd do it, it's the way I do it.

I mean, I've -- if that's what they want to do and it's an informed decision, that's fine with me. I don't know if that's right.

Q Okay. Do you recall if -- You're saying -- Did you or Mr. Hacker make the decision not to put on a defense?

A Well, he would have had to have been part of it. I mean, I'm -- I mean, we kept him informed as to everything.

But I guess I have to say that in the abstract, because I don't remember if we had witnesses not to put on, but if we didn't have them there, he would have been part of those decisions not to have them there.

I mean, I'm not trying to be evasive, I just can't remember how we did it.

Q That's what I'm asking is what you remember. Do you -- Would he have been part of a decision/ for example, of whether to cross- or not to cross-examine Nickey Don Smith?

A I doubt it.

Q You make those decisions, right?

A I don't see how you could have not crossed him. I think that would have been ineffective.

Q Okay. You have to make the decisions during closing or during the prosecutor's questioning about whether to object or not, right? You don't talk to the client about that?

A True, true. Legal decisions -- A lot of times, like when you write a brief or you make a legal argument or something, you know, I might – you might tell them what you're doing, but I don't think that they're necessarily involved in the decision.

Q In a case like this, with a codefendant who wouldn't testify, a terribly notorious crime, and a client who wants to preserve his Fifth Amendment Rights, and probably wants – should save his testimony for sentencing, prior to LaRock, the answer might have been different, but as the law has evolved, do you really think that that's a decision that a client should be allowed to make, or one where the lawyer ought to say, "Look, there is no factual or strategic reason not to do this. We must do it"?

A I don't know if that's a "We must do it" or not. I didn't do it in this case, and – you know, in retrospect, if we would have to try it again, you know, I'd beat him on the head to bifurcate.

Q Do you recall if you pressed him on that?

A I can recall that I was of the opinion and told that I thought that we ought to bifurcate. And let me say this, if it would be responsive to your question or helpful, I think had I made the motion to bifurcate and it would have been denied, I think that it, under LaRock, probably would have been error.

Q Because?

A Because I think it should have -- I think that that's a motion that legally should have been granted. I mean, LaRock does hold that there are times that the Court, in exercising discretion, can deny the motion and it be reversible error, but --

Q Okay.

A -- I mean, that's just speculation on my part, because I didn't make the motion.

Q In sitting here today, and the laws has evolved and time has past, but sitting here today, you can't think of anything, can you, that Mr. Hacker gained by that motion not being made?

A That's correct.

Q Do you remember if you ever reviewed the transcript of the trial, at all?

A I have never seen a transcript. And - - There was an appeal, and I know that maybe my name ended up on the petition or something, but that was done by someone in Mr. Guthrie's office.

Q An appeal taken and petition denied.

A It was my understanding that the petition was denied, and then, I think, there was an appeal to the Supreme Court, and I don't know --

Q Meaning the U.S. Supreme Court?

A Yeah, U.S. Supreme Court. And I don't know who did that, perhaps -- I don't know who did that.

Q But you weren't involved in that?

A No.

MR. BAILEY: Can we have a minute, your Honor?

THE COURT: Yes, sir.

(WHEREUPON, there was an inaudible discussion held between Mr. Bailey and Ms. Purdy.)

BY MR. BAILEY:

Q Don't you wish that you could always see things twenty-twenty?

A Yes.

MR. BAILEY: I don't have any other questions. Thank you.

THE COURT: Mr. Valentino.

REDIRECT EXAMINATION

BY MR. VALENTINO:

Q Greg, Mr. Bailey asked you if you can think now, of course, years later, if Mr. Hacker gained anything from that decision not to bifurcate a trial, and, obviously, when he got the most time that he could actually get out of this charge, the answer would be "No, he didn't gain anything from that decision."

But as you sit there today, if you were to go back in time -- you actually sat through the whole trial and sat through the preparation of the trial, you can't say that there's reasonable probability that the outcome would have been different had you made a different decision, can you?

MR. BAILEY: Your Honor, that's awfully speculative, and without objection, I don't have any trouble with him answering, but that's pretty speculative.

MR. VALENTINO: That's what they have to prove, Judge.

THE COURT: Well, I'm going to let him answer the question, if he can.

WITNESS MR. CAMPBELL: Would it -- I think that it could have made a difference between with and without mercy.

MR. VALENTINO: Sure.

WITNESS MR. CAMPBELL: I'm not sure --

I mean, given everybody's testimony like it came out in trial and stuff, I think that it very well could have made a difference between with and without.

BY MR. VALENTINO:

Q Okay. Well, that's what I'm saying. With Nickey Don Smith -- Well, forget for a moment that there's a claim that he perjured himself, but the trial, as it went, you can't sit there and say that there's a reasonable probability that it would have been different, can you?

A Only with the same reality that an appellate court can.

Q Okay, sure. Now, Mr. Hacker did make an allegation that you failed to present a defense. You did talk to Mr. Hacker about testifying, correct?

A Well, I -- I mean -- put on a defense to what?

Q Well, I mean --

A The charges? Or --

Q Yeah. Well, yeah, the charges, because -- Let me talk about that for a minute, because that was one of the allegations that you failed to present a defense.

You've already testified that he told you

* * *

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRADLEY EARL HACKER,
Petitioner,

v. Petition No. _____
Kanawha County Criminal No. 02-F-295

THOMAS L. McBRIDE, Warden,
Mount Olive Correctional Complex,
Respondent.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Bradley Earl Hacker ("Petitioner) is currently confined to the Mount Olive Correctional Facility pursuant to his conviction for the felony murder of Jason Gill, without a recommendation of mercy, and the related offense of possession of marijuana with intent to deliver. He has been incarcerated since early February 2002. On January 8, 2003 Petitioner was sentenced to consecutive terms of life imprisonment without mercy for the felony murder conviction and one to five years' imprisonment for the related possession offense.

By this Petition, Petitioner moves this Court to issue a writ of habeas corpus because of newly discovered evidence not previously known or available to Petitioner or his counsel. The predicate for the Petition consists of the recantation of admittedly perjured trial testimony by Nickey Don

Smith, a jailhouse informant who testified as a prosecution witness during Petitioner's trial, and what is tantamount to a confession of guilt by Petitioner's co-defendant John Frye, who pleaded guilty to the murder of Jason Gill subsequent to Petitioner's conviction for the same offense. Petitioner submits that

* * *

Petitioner's constitutional right to due process, embodied in a fair and impartial jury, was violated when the prosecution exhorted the jury to vengeance. A new trial would be cleansed of this taint.

C. Counsel's Ineffective Assistance Violated Petitioner's Sixth Amendment Rights

The Sixth Amendment to the Constitution of the United States and Article III, § 14 of the Constitution of West Virginia not only assures the "assistance of counsel" to a defendant in a criminal proceeding, but also assures that such a defendant receives competent and effective assistance of counsel. See Cole v. White, 180 W. Va. 393, 395, 376 S.E.2d 599, 601 ("The right of a criminal defendant to assistance of counsel includes the right to effective assistance of counsel.") Claims of ineffective assistance of counsel are governed by the two-prong test established in Strickland v. Washington, 466 U.S. 668 (1984) and subsequently adopted in West Virginia in State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995):

> (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. pt. 5, Miller. Failure to meet the burden of proof on both issues is fatal to a *habeas* petitioner's claim. State ex rel. Daniel v. Legursky, 195 W. Va. 314, 321, 465 S.E.2d 416, 423 (1995).

Applying the first or performance prong, the petitioner must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court then must determine whether, in light of all the circumstances, the identified acts of omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The second or prejudice prong inquires whether counsel's deficient performance adversely affected the outcome in a given case. Prejudice must only be proven by a preponderance of the evidence. Syl. pt. 22, State v. Thomas, 157 W. Va. 640, 203 S.E.2d 445 (1974).

1. **Counsel was Ineffective Based on Failure to Move to Bifurcate Guilt and Penalty Phases of Petitioner's Trial**

Although a motion to bifurcate guilt and penalty phases of Petitioner's trial was available to defense counsel, they failed to make such a motion. The prejudice to Petitioner was extreme because

that failure prevented presentation of any evidence supporting mitigation or mercy. Instead, the jury was required to make its recommendation on mercy, having heard only evidence of guilt, including the devastating perjured testimony of Nickey Don Smith.

West Virginia Code section 62-3-15 provides in relevant part:

> If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree . . . . [a]nd if the jury find in their verdict that he or she is guilty of murder of the first degree . . . he or she shall be punished by imprisonment in the penitentiary for life, and he or she . . . shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that . . . such person shall not be eligible for parole until he or she has served fifteen years[.]

Id. Under this statute, the jury determines guilt and simultaneously determines whether life imprisonment or a sentence of life with a recommendation of mercy will be imposed.

In a notable dissent to this unitary procedure, Justice Neely explained the strategic impasse in which this requirement places defense counsel and the defendant:

> [I]t is unreasonable to believe that a simultaneous assertion of innocence and mitigation is workable in a criminal jury trial. It is impossible for a criminal defendant to maintain his innocence, introduce evidence in support of that proposition, and simultaneously introduce all of the evidence which would tend to mitigate the punishment.
>
> Since evidence of mitigation can only be taken as a confession of guilt, the criminal defendant will frequently be forced, as a matter of strategy, to curtail or eliminate his presentation of evidence on mitigating circumstances. Any such compelled choice undeniably burdens the criminal defendant's right to be heard on the issues of punishment and sentence.
>
> On the other hand, a criminal defendant who chooses, from necessity, to introduce evidence on mitigation suffers the loss of his right to have the State prove its case beyond a reasonable doubt while he stands mute and offers no evidence on the issue of innocence. This is the time-tested way

> of securing a jury acquittal and as the right is constitutionally guaranteed to a defendant, any procedure which circumscribes its use is inherently unconstitutional.[4]
>
> . . . There is no reason why a jury cannot hear evidence on mitigation after it has returned a verdict, as such a procedure imposes no unreasonable burden on the court which would outweigh the advantages to be obtained in terms of rational procedure.

State ex rel. Rasnake v. Narick, 159 W. Va. 542, 553, 227 S.E.2d 203, 207-09 (1976) (Neely, J., dissenting).

Justice Workman commented in a later dissent, the "determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by a full presentation of all relevant circumstances without regard to strategy during trial on the merits." Schofield v. West Virginia Dept. of Corrections, 185 W. Va. 199, 207, 406 S.E.2d 425, 433 (1991) (Workman, J., dissenting).

In 1996 the Supreme Court of Appeals of West Virginia recognized that these powerful dissents presented the correct analysis and held that a trial

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[4] The Supreme Court of Appeals of West Virginia has never agreed that the statute is unconstitutional. See Billotti v. Dodrill, 183 W. Va. 48, 394 S.e.2d 32 (1990); Moore v. McKenzie, 160 W. Va. 511, 236 S.E.2d 342 (1977); State ex rel. Rasnake v. Narick, 159 W. Va. 542, 227 S.E.2d 203 (1976).

court has discretionary authority to bifurcate a trial and sentencing in any case where the jury is required to make a finding as to mercy. State v. LaRock, 196 W. Va. 294, 314, 470 S.E.2d 613, 633 (1996). Under the LaRock court's analysis, such a motion to bifurcate is generally a discretionary matter of trial management and the court should weigh possible alternative safeguards such as limiting instructions and considerations of judicial economy such as the length of the trial. See id. In one situation, however, a trial court abuses its discretion when it denies a motion to bifurcate. A trial court abuses its discretion where "compelling prejudice" exists, that is, "where a defendant can demonstrate that without bifurcation he or she was unable to receive a fair trial regarding the finding of mercy and that the trial court could afford no protection from the prejudice suffered." Id., 196 W. Va. at 314, 470 S.E.2d at 633.

In the face of compelling prejudice, a trial court is required to grant a motion to bifurcate. In Petitioner's trial, though, counsel failed to offer the motion and thus subjected their client, the Petitioner, to prejudice, which was compelling for just the reasons Justice Neely outlined so eloquently. Defendant was caught in a catch-22 situation because he could not argue both that he was innocent and, by the way, if the jury should disagree, then here is evidence in mitigation and for mercy. Instead, at Petitioner's trial, the testimony from Nickey Don Smith, which we now know was perjured, was graphic and highly inflammatory. At the very least, bifurcation would have increased the time and the decisional and logical connections

between Smith's testimony, the finding of guilt and the jury's independent deliberations on mercy. Additionally, evidence of Petitioner's personal qualities or testimony from his mother who was dying of cancer during his trial might have provided a basis for mercy that was unavailable without bifurcation.

Because evidence of mitigation is essentially admission of guilt, Petitioner necessarily was prevented from offering such evidence at his trial on the merits. Evidence in support of mercy would have been self-incriminating. Failure to move to bifurcate can not be justified as a reasonable or strategic decision. Instead, counsel's failure inevitably prevented the jury from objective consideration of a recommendation of mercy. Combined with exhortations to revenge in this "classic case" of murder, the unitary trial prevented the jury from impartial deliberation. That process prejudiced Petitioner and led, inexorably, to a sentence of life without mercy, without a possibility of parole. Counsel's failure deprived Petitioner of due process.

2. Counsel was Ineffective for Failing to Object to Prosecution Errors, Failing to Present a Defense and, Particularly, for Failing to Rebut the Testimony of Nickey Don Smith

As discussed previously, counsel for Petitioner failed to object to any of the errors when the prosecution referred to Petitioner's remaining silent and not taking the witness stand, when the prosecution vouched its case, and when the

prosecution urged the jury to exact vengeance on Petitioner. Defense counsel failed also to move to bifurcate the guilt and penalty phases of Petitioner's trial, preventing Petitioner from presenting any evidence in mitigation. These serious errors contributed to the impression that there was no rebuttal to the prosecution's "classic" case, and that Petitioner had nothing to offer in response because, a reasonable jury might reason, he was guilty.

The most serious error, though, is apparent on any cursory review of the trial transcript. Nickey Don Smith was allowed to purvey a pack of lies, to manufacture a story that made Petitioner out to be a calculating, cold-blooded and remorseless

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IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

IN THE MATTER OF:

PETITION FOR WRIT OF HABEAS CORPUS
BY BRADLEY EARL HACKER
(Kanawha County Criminal No. 02-F-295)

AFFIDAVIT
STATE OF WEST VIRGINIA,
COUNTY OF FAYETTE, TO-WIT:

After being duly sworn, JOHN FRYE, hereby deposes and says as follows:

1. I am above the age of twenty-one (21), being 25 years old, and competent to testify.

2. I execute this affidavit voluntarily and no promises or threats have been made to me to obtain any of the information contained herein.

3. I am currently incarcerated at Mt. Olive Correctional Complex, serving life without mercy for the murder of Jason Gill, having pied guilty to that offense.

4. In December 2002, following trial, Bradley Earl Hacker was also convicted of first degree murder (felony murder) for the murder of Jason Gill and sentenced to life without mercy.

5. I did not testify at Brad Hacker's trial because I was awaiting trial on the same charges. If I had testified and told the truth, I would have had to incriminate myself.

6. Prior to the trial, I gave a number of false statements to the police because I was afraid of what might happen to me and tried to blame other people, including Brad Hacker. I would like to tell the truth now and clear the record. Brad Hacker did not kill Jason Gill.

7. Although Brad Hacker was with me, I was the person who shot Jason Gill on Saturday night, January 19, 2002. I shot him once in the back of the head and twice after that.

8. I shot Jason Gill because friends told me he was sleeping with my then girlfriend, Tiffani Hughes.

9. I was doing Ecstasy, alcohol, weed (marijuana) and Xanax, so I was crazy at the time and couldn't get over my jealousy.

10. I told Brad Hacker "I'm going to kill that guy", but I don't think Brad believed me.

11. I set up a deal to obtain five pounds of marijuana from Jason Gill as an excuse to get Jason Gill in the vehicle with us. Brad Hacker drove because I didn't have a car. I had a .380 caliber pistol that I had borrowed from Jason Haddox.

12. There was no plan and I had no intent to rob Jason Gill that night. The marijuana deal was only an excuse to get Gill out to meet with me. We were parked by the river on Coal River Road. We were smoking a marijuana "blunt" and I ashed the blunt out the window and dropped it in an excuse to get Gill out of the vehicle. We got out to look for it.

Brad Hacker was behind the jeep. Jason Gill was facing the jeep and I went behind him and shot him in the back of the head. I then shot him two more times.

13. Brad Hacker started puking violently and told me "I don't want to touch him." I made him help me put him in the back of the jeep. I couldn't lift him myself. I believe Hacker was afraid of me at that point.

14. After I shot Jason, I threw the gun in the river in one direction and the clip in another where the shooting occurred.

15. We drove around for a while. Hacker was driving. He was hyperventilating and shaking violently so he could hardly drive. I told him to drive to my mother and stepfather's place in Tornado. I called my mom with Brad's cell phone to get the keys to the gate so we could take the body to my parents' property. That night we got a tarp from my mom's shed, took the body up on the property, wrapped it in the tarp and laid it on the ground by the side of the road.

16. The next morning, January 20, 2002, which was Sunday morning, I called Brad Hacker and told him he needed to meet me. He said he would be there in 20 minutes, but I waited an hour and a half. I called him from the pay phone at a store near my apartment several times.

17. Finally in the late morning, Hacker picked me up and we got one shovel from Tiffani's house and then we drove to Tornado. We stopped at

my mom's and got a shovel, mattock, gas can, tire and cinderblocks from the shed at their house.

18. We drove up on the hill where the body was. Brad refused to help me do anything with it except to put the body on the two cinderblocks -- nothing else. Brad stood by the jeep the whole time. I broke one of the shovels because I was digging by myself and the ground was frozen. That was the reason that the grave was so shallow. Brad never touched Jason Gill's body.

19. I did not mutilate Jason Gill's body the way it was testified to at Brad's trial. After I burned it to try to get rid of it, the arms and feet just fell off. All I know is that maybe the fire was so hot that it just burnt them up. I did not mutilate or break the body in any way.

20. After the body was burned and buried, we went to a car wash and tried to clean out the back of the car. There was blood everywhere.

21. I took most of the five pounds of marijuana that Jason had brought for the marijuana deal we had arranged. I gave Brad some of it. Jason did not have money with him and we did not steal any money from Jason. Brad did not take any money from Jason. I sold the marijuana I took and got money to buy myself a car.

22. Brad Hacker did not have a gun with him that night. I knew he sometimes had a .45, but he did not have it with him on the night of January 19, 2002.

23. Brad did not order new carpet for his jeep. I went to DAR and ordered the carpet for the jeep, but I never picked it up. I had my hair in a ball cap and maybe that was why the people from DAR identified Brad as the person who ordered the carpet, but it was me.

24. I just want to set the record straight and tell the truth. This is the truth that I have told in this Affidavit.

Further affiant saith not.

/s/ John Frye

John Frye

Taken, subscribed and sworn to before me this 13th day of May, 2005.

My Commission expires: December 24, 2005

/s/

Notary Public

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

IN THE MATTER OF:

PETITION FOR WRIT OF HABEAS CORPUS
BY BRADLEY EARL HACKER
(Kanawha County Criminal No. 02-F-295)

AFFIDAVIT
STATE OF WEST VIRGINIA,
COUNTY OF PLEASANTS, TO-WIT:

After being duly sworn, NICKEY DON SMITH, II, hereby deposes and says as follows:

1. I am over the age of twenty-one (21) years and competent to execute this Affidavit.

2. I execute this Affidavit voluntarily and no promises or threats have been made to me to obtain any of the information contained herein.

3. At the time of execution of this Affidavit I am incarcerated at the St. Marys Correctional Facility in Pleasants County, West Virginia, for violation of terms of probation imposed on my plea of guilty entered before Judge Irene Berger of the Circuit Court of Kanawha County, West Virginia, to the offense of unlawful wounding.

4. On December 12, 2002, I testified as a witness for the prosecution during the trial of Bradley Earl Hacker ("Hacker") for the first degree murder of Jason Gill, which trial was held in the Circuit Court of Kanawha County, West Virginia, before Judge James Stucky.

5. I testified that I was incarcerated with Hacker from February to April, 2002, in the same "pod" at the South Central Regional Jail and that during that time, Hacker confided in me regarding the details of the murder of Jason Gill which he allegedly helped to commit in January 2002.

6. During that trial, I testified falsely to many of the details of the murder that said that Hacker had told to me, including the grisly details of the shooting of Jason Gill, and how Hacker and his co-defendant, John Frye, disposed of Gill's body afterward.

7. I testified falsely against Hacker in an attempt to enhance my chances for a favorable sentence from Judge Berger in connection with the plea of guilty which I had entered before hereto the charge of unlawful wounding, and further fabricated details regarding the information that I obtained from Hacker because at the time of my statement to the authorities and my testimony, I had a personal "vendetta" against Hacker.

8. The personal vendetta which I had against Hacker resulted from the fact that he owed me $200.00, money he had borrowed from me for tobacco and other items from the commissary, and rather than paying me the money which I felt he owed, arranged to be transferred to another pod, thereby causing me to lose face with other inmates.

9. While we were incarcerated together and before our "falling out," I befriended Hacker because I felt he was a "rich kid" who talked too

much and I thought I could help him learn how he should act while in jail awaiting trial.

10. While Hacker did tell me details about what happened the night of January 19, 2002, I manipulated those details, fabricated others, and used them against Hacker in my testimony.

11. I now recant the following testimony which I gave at Hacker's trial, regarding the details of the murder of Jason Gill on the night of January 19, 2002, and the following day:

a. Contrary to my testimony at trial, Hacker did not tell me that he and Frye had any previous arrangement or plan to rob Jason Gill. In fact, Hacker told me that he took no money from the scene of the murder or derived any personal benefit from the murder itself;

b. Contrary to my testimony, Hacker did not indicate that he and Frye intended to rob Gill, but that the purpose of the meeting with Jason Gill was to "pick up" some "weed" (marijuana) from Gilt, who had supplied marijuana on previous occasions to John Frye;

c. Hacker further told me repeatedly that he took no part in the shooting of Jason Gill, nor was he aware that the same was going to happen. Instead, he told me that John Frye shot Jason Gill once in the back of the head, and then twice more;

d. The testimony I gave that Hacker had taken the gun from Frye and then shot Jason Gill himself was an invention of my own in order to implicate and harm Hacker, and assist in my own sentencing;

e. Hacker described to me the gun that Frye had used that night and because I was a collector of guns, I concluded that the weapon used was a .380 caliber. While Hacker did tell me that his father owned a .45 caliber revolver, he did not tell me that he had a gun with him on the night of January 19, 2002, when John Frye murdered Jason Gill, as I testified at trial;

f. I further testified that Hacker had told me that he and John Frye had turned Gill's body upside down to drain the blood from Jason Gill's body. This was a fabrication and it occurred to me because my family used to treat pigs that way when we butchered them;

g. Hacker further told me that after he saw John Frye shoot Jason Gill, he was extremely afraid that Frye would also kill him, and that's why he assisted Frye in helping to load Gill's body in the back of Hacker's Jeep;

h. Hacker further told me that his sole intention that night in meeting Jason Gill was to "get high." Hacker told me, "we just smoked a joint and then my friend was dead."

After that, Hacker informed me that what he did was out of a fear of John Frye; and,

i. I further falsely testified that Hacker told me that before the murder of Jason Gill, he had placed plastic or a "tarp" in the back of his Jeep. Instead, the only thing that Hacker told me regarding the attempts to dispose of the body of Jason Gill was that John Frye got tires, a mattock and a shovel from his mother at her residence, which were then used to dispose of the body on property owned by Frye's mother or stepfather.

12. Some of the details I included in my testimony, I elicited from Hacker. For example, Hacker told me that the blood streamed out of Gill after he was shot like "pissing." However, when Hacker told me this, he was merely attempting to describe the condition of the body of Jason Gill as he saw it immediately after he had been murdered by John Frye. At no time did Hacker ever describe Gill's murder to me as being a "joke" as I testified at trial. To the contrary, Hacker has never treated the murder of Jason Gill as anything but a serious and regrettable incident in his comments to me.

13. I obtained other details relating to the murder of Jason Gill from another inmate named Chris Rectenwald, who was incarcerated with John Frye and then moved to our pod. I now believe that Rectenwald provided me with these details to help John Frye harm Hacker, because I believe that Frye wanted to be sure that Hacker would be punished for the crime that Frye committed.

14. Chris Rectenwald also told me that Tiffany Hughes, Frye's then girlfriend, was sleeping with Jason Gill prior to his murder and that this was the reason that Frye murdered Jason Gill.

AND FURTHER AFFIANT SAITH NOT.

/s/Nickey Don Smith, II

Taken, subscribed and sworn to before me the 12th day of May, 2005, in the county and state aforesaid

My Commission expires September 9, 2008

/s/ Linda E. Conaway

Notary Public